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ARTICLE

The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole

By JAMES G. POPE*

> A Black Hole is a region of space . . . into which matter has fallen, and from which *nothing* . . . can escape . . . . In the vicinity of a Black Hole, and even more so inside one, conditions become so strange that to describe them in everyday language is wellnigh impossible. Our common sense notions and our cherished scientific laws take a very heavy beating, and right in the centre of a Black Hole they cease to have any meaning at all.[1]

The Burger Court's First Amendment decisions concerning commercial speech, labor picketing, and political expenditures point toward a return to the free enterprise values of the *Lochner* era.[2] Yet, the Burger Court has continued the Warren Court's vigorous protection of civil rights protests—even where such protection clashes with free enterprise values.[3] This dichotomy is revealed most clearly in cases involving arguably economic restrictions—such as boycott prohibitions,

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1. I. NICOLSON & P. MOORE, BLACK HOLES IN SPACE 6-7 (1974).

2. *See, e.g.*, Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235 (1981); Dorsen & Gora, *Free Speech, Property, and the Burger Court: Old Values, New Balances*, 1982 SUP. CT. REV. 195; Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979); Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982); Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938 (1982). For an overview of the *Lochner* era itself, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 434-55 (1978).

3. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (state may not prohibit peaceful boycott of white-owned businesses in protest of racial injustice); Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979) (school board's interest in employee discipline does not justify the discharge of teacher for protesting racial employment policies).

campaign spending regulations, and government employee disciplinary policies—applied to arguably political expression. Such cases force the Court to choose between free-enterprise values and "uninhibited, robust, and wide-open"[4] political debate.

On reviewing these cases, one's first impression is likely to be that the Court has abandoned all semblance of judicial neutrality. Indeed, it appears that the Court's practice could be summed up in three maxims: civil rights activists always win; corporations sometimes win; and unions and employees, except civil rights activists, almost always lose.

For example, while secondary boycott picketing by a civil rights organization demanding economic justice for blacks has been protected under the First Amendment,[5] secondary boycott picketing by unions demanding economic justice for workers[6] and protesting the Soviet invasion of Afghanistan has not.[7] Government employees have been protected against discharge in retaliation for raising grievances concerning racially discriminatory employment practices,[8] but not for raising grievances concerning employment conditions in general.[9] Corporate speech may not be restricted solely on the ground that the speaker is a corporation,[10] but labor picketing may be restricted under statutes that apply only to labor unions, leaving other groups free to engage in precisely the same activities.[11] Unions must, upon request by dissenting members, refund the portion of dues used for political expression;[12] corporations may expend corporate resources despite shareholder dissent.[13] Civil rights organizations have been accorded First

4. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

5. *See Claiborne*, 458 U.S. 886 (1982) (discussed *infra* text accompanying notes 209-18).

6. *See* NAACP v. Retail Store Employees Union, Local 1001, 447 U.S. 607 (1980) (*Safeco*) (discussed *infra* text accompanying notes 185-97).

7. *See* International Longshoremen's Ass'n v. Allied Int'l Inc., 456 U.S. 212 (1982) (*ILA*) (discussed *infra* text accompanying notes 219-26).

8. *See* Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979) (discussed *infra* text accompanying notes 153-55).

9. *See* Connick v. Myers, 103 S. Ct. 1684 (1983) (discussed *infra* text accompanying notes 136-57).

10. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 776-77 (1978) (striking down state statute that prohibited corporations from engaging in advocacy concerning referenda that did not materially affect their business).

11. *See infra* note 35.

12. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (public employees unions must refund to dissenters the portion of their dues that has been used for political purposes). *See also* International Ass'n of Machinists v. Street, 367 U.S. 740, 749 (1961) (relying on labor legislation to guarantee similar refunds for certain dissenting private employees, but noting that constitutional questions of "the utmost gravity" lurked in the background).

13. *See Bellotti*, 435 U.S. at 792-95; *see also* Brudney, *supra* note 2, at 256 n.77.

Amendment protection against anti-communist affidavit requirements;[14] labor unions have not.[15] Civil rights organizations have been permitted to conduct sit-in protests against private business practices on private property;[16] labor unions have not.[17]

This Article explores the doctrinal structure underlying this pattern of results. It seeks to identify the areas of stress where the clash of values is at its sharpest, and the areas of settled law where the conflict is muted by relatively impartial and determinate doctrine. Part I suggests that the Court has divided social reality into three systems—the system of representative government, the commercial market, and the system of labor relations. Speech is afforded constitutional protection according to its role in the functioning of these three systems. On the ladder of First Amendment values, political speech occupies the top rung, commercial speech rests on the rung below, and labor speech is relegated to a "black hole" beneath the ladder. Part II surveys the boundaries of the three systems and suggests that, in spite of conflicting signals from the Court, the cases can be rationalized according to four simple propositions. Part III assesses the three-systems ladder in light of the now-dominant functional view of the First Amendment.[18] The Article concludes that by granting constitutional protection to some rights of

14. *See* Louisiana v. NAACP, 366 U.S. 293 (1961) (striking down state law that required "non-trading associations" to file an affidavit stating that none of the officers of any out-of-state organizations with which they were affiliated were members of a communist or subversive organization).

15. *See* American Communications Ass'n v. Douds, 339 U.S. 382 (1950) (upholding provision of the NLRA which required all union officers to submit anti-communist affidavits before their unions gained the benefits of certain provisions of the Act).

16. In a series of cases, the Court managed to provide such protection to civil rights activists without squarely addressing the First Amendment issues. *See, e.g.,* Garner v. Louisiana, 368 U.S. 157 (1961) (discussed *infra* text accompanying notes 198-203); *see generally* H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 123-72 (1966).

17. *See* NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 253 (1939) (state may prohibit employees from occupying factory in protest against their employer's unlawful anti-union activities).

18. The functional view, or process theory, of the First Amendment is grounded in the famous *Carolene Products* footnote. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). Originated by Alexander Meiklejohn, this theory has since been systemized and perfected by John Hart Ely and Jesse Choper. *See* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); A. MEIKLEJOHN, POLITICAL FREEDOM (1960); J. ELY, DEMOCRACY AND DISTRUST (1980); J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980). Under this view, the Constitution erects a system of representative democracy. As long as the political process functions smoothly, the Court—an unelected and thus "anti-majoritarian" branch of government—should refrain from thwarting the will of the majority as expressed in the actions of the legislative and executive branches. The principal function of judicial review is to insure that the process operates consistently with constitutional norms.

economic expression the Court has ventured onto a slippery slope toward general rights of economic participation.

I. The Three-Systems Ladder

The idea of content neutrality in First Amendment analysis lives on,[19] but by now it should be clear that the Supreme Court has established a "hierarchy of first amendment values" [20] among various types of protected speech.[21] "Public" speech has more value than "private" speech and "political" speech more than "economic" or "commercial" speech. "Labor" speech, though not explicitly recognized as a separate category, in practice sits at the bottom.[22] The hierarchy may be depicted as a ladder with two rungs straddling a "black hole." Each level of this three-level structure corresponds to a central institution in our society: the top rung to the system of representative government, the second rung to the commercial market,[23] and the black hole to the sys-

19. *See, e.g.*, L. TRIBE, *supra* note 2, at 672: "Within the sphere of protected speech, the Supreme Court has ordinarily called all expression equal, labeling no individual or class of expression as more or less valuable than any other and regarding all as deserving the same first amendment protection." In his forthcoming book, Professor Tribe recognizes that this generalization has been eroded by recent Supreme Court decisions, but maintains that it still functions as the basic norm. *See* L. TRIBE, CONSTITUTIONAL CHOICES 194 (Harv. U. Press, forthcoming). *See also* Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 19 (First Amendment prohibits weighing the social utility of speech); Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 29-35 (1975) (all speech must be subjected to the same test).

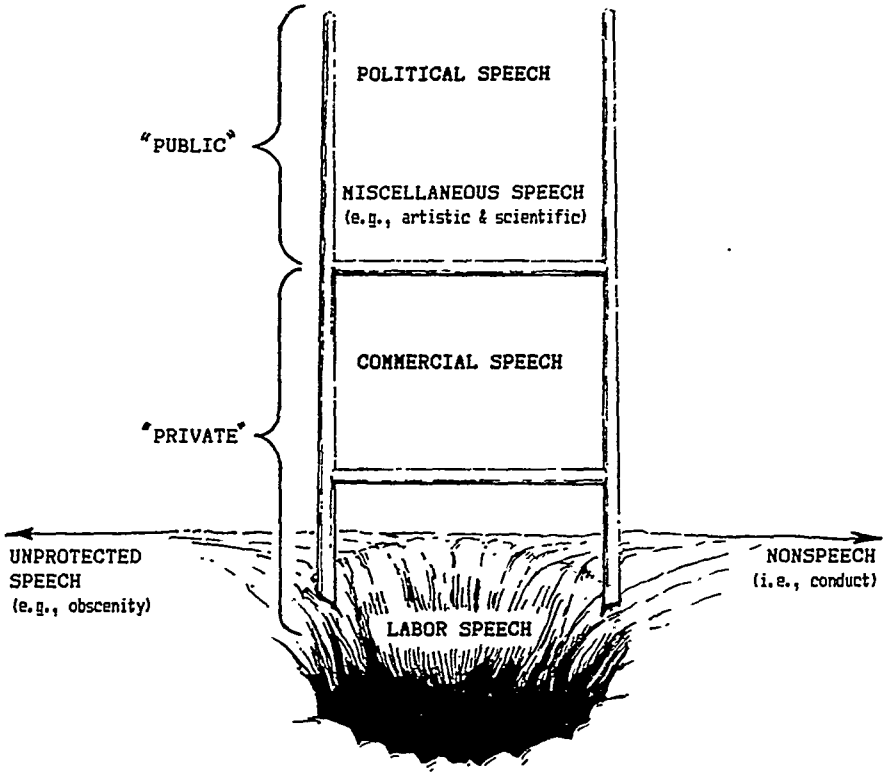
20. Carey v. Brown, 447 U.S. 455, 467 (1980).

21. In recent years the Court has, as a matter of course, assessed the value of protected expression prior to considering the government's interest in suppression. *See, e.g., Connick*, 103 S.Ct. 1684 (1983); *ILA*, 456 U.S. 212 (1982); *Claiborne*, 458 U.S. 886 (1982); *Safeco*, 447 U.S. 607 (1980); Pickering v. Board of Education, 391 U.S. 563 (1968). These cases are discussed in part II of this Article. Intermediate levels of protection have been accorded "commercial" speech, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), and "offensive" speech, FCC v. Pacifica Found., 438 U.S. 726 (1978) (plurality opinion).

22. "Public" speech may be defined roughly as speech other than "economic" speech. Generally, "economic" speech is "commercial" plus "labor" speech. "Private" speech is roughly synonomous with "economic" speech. More precise doctrinal definitions of "political," "commercial," and "labor" speech are developed in part II of this Article. For now, it should be sufficient to keep the following intuitive definitions in mind: "political" speech is speech concerning public policies or the operation of government; "commercial" speech is speech, other than labor speech, that concerns solely the economic interests of the speaker; "labor" speech is speech by employers or employees concerning labor relations or conditions in the workplace. The imprecise and overlapping character of these definitions poses one of the doctrinal problems addressed by this Article.

23. The term "commercial market" as used here includes all market interactions other than labor relations.

THE THREE-SYSTEMS LADDER OF PROTECTED EXPRESSION



tem of labor relations.[24] Speech essential to the functioning of the political system receives the highest level of protection; speech that facilitates the functioning of the commercial market is at an intermediate level; and speech relating to the system of labor relations receives virtually no protection at all.

Speech that is only peripherally related to any of the three systems—most notably artistic and scientific expression—is accorded a level of protection higher than commercial speech but lower than political speech. To round out the picture, the ladder may be situated between two areas of nonprotection. To one side the speaker may fall off the ladder into an explicitly unprotected category of speech; to the

24. The term "system of labor relations" as used here encompasses both the public and private sectors.

other side he may fall off into "nonspeech" or conduct.[25]

The priority of political speech over other types of expression is now widely endorsed by commentators.[26] The Supreme Court, while rejecting the extreme view that only political speech should be protected,[27] has attached major consequences to the distinction. The classification of speech as "political" or "public" has been decisive in the Court's decisions providing protection against libel laws,[28] bar solicitation regulations,[29] prohibitions on group professional practice,[30] antitrust laws,[31] secondary boycott prohibitions,[32] government employee

25. In this framework, "offensive" speech clings to the left hand side of the ladder, in danger of falling off into the unprotected category of obscenity. *See infra* note 34. Speech relating to sex could constitute a fourth type of protected speech corresponding to the system of sexual relations of power, *see, e.g.*, C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEXUAL DISCRIMINATION (1979), and hence would fall into the general rubric of the approach suggested here. This Article, however, is limited to types of speech on the political-economic spectrum.

26. In addition to the works cited *supra* note 18, see BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41, 51 (1974); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). Dean Ely, who has made the most thorough arguments for special protection of political speech, nevertheless argues that, with narrow exceptions, all speech should be protected. J. ELY, *supra* note 18, at 109-16.

27. Alexander Meiklejohn, the premier advocate of special protection for political speech, has suggested that political speech should be entitled to "absolute" protection, while other types of expression should not be protected. Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245 (1961). Meiklejohn's definition of "political" speech is fairly broad, encompassing education, philosophy, science, literature, the arts, and "public discussions of public issues." *Id.* at 256-57. *See generally* A. MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 18. For a narrower definition of "political" speech see Bork, *supra* note 26, at 27-28.

28. New York Times Co. v. Sullivan, 376 U.S. 254, 270, 279-80 (1964) (Criticism of public officials, unless made with "actual malice" is protected against libel prosecutions in order to insure that debate on public issues is "uninhibited, robust, and wide-open.").

29. *Compare In re* Primus, 436 U.S. 412, 428 (1978) (overturning state bar disciplinary sanction imposed on ACLU for violating solicitation restrictions because, for the ACLU, "litigation is not a technique of resolving private differences; it is a form of political expression and political association") *with* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (upholding disciplinary sanction imposed on attorney for violating solicitation restrictions in connection with contingent fee representation).

30. *Compare* United Mine Workers, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967) (group legal practice protected on the basis of right to associate to gain access to courts) *and* NAACP v. Button, 371 U.S. 415 (1963) (group legal practice protected as means of political advocacy) *with* Garcia v. Texas State Bd. of Medical Examiners, 421 U.S. 995 (1975) (prohibition against group medical practice upheld despite First Amendment challenge based on right to associate).

31. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc, 365 U.S. 127 (1961) (railroads' propaganda campaign against trucking industry, otherwise violative of the

disciplinary sanctions,[33] prohibitions against "offensive" words,[34] and subject matter restrictions.[35] Restraints on political or "public" speech will be upheld only if they are precisely drawn to serve a compelling governmental interest.[36]

It is also widely accepted that commercial speech should be afforded less constitutional protection than political speech. Whether commercial speech should be protected at all, however, is hotly de-

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Sherman Act, is protected First Amendment expression because directed at influencing state legislature).

32. *Claiborne*, 458 U.S. 886 (1982) (state cannot ban secondary boycott by civil rights group). *But see ILA*, 456 U.S. 212 (1982) (upholding prohibition on labor union's secondary boycott under federal labor law). The seeming inconsistency of these two cases is discussed and explained *infra* text accompanying notes 227-33.

33. *Compare* Pickering v. Board of Educ., 391 U.S. 563 (1968) (reinstating teacher discharged for publicly criticizing school board policies) *with Connick*, 103 S.Ct. 1684 (1983) (upholding discharge of assistant district attorney for "private" speech connected with protest against employment conditions in office). For a detailed discussion of these and other cases involving government employees, see *infra* text accompanying notes 90-160.

34. *Compare* Cohen v. California, 403 U.S. 15 (1971) (state may not prohibit the display of the slogan "Fuck the Draft" on a jacket worn in a courthouse) *with* FCC v. Pacifica Found., 438 U.S. 726 (1978) (FCC may restrict the broadcast of "offensive" words such as "fuck," "shit," and "piss," in a humorous monologue). The Court in *Pacifica* raised numerous other possible grounds for distinction. There is no particular reason, however, to think that children would be more likely to be exposed to a radio broadcast than to a jacket worn in a public place. Nor is it probable that Cohen's conviction would have been sustained had he worn a jacket adorned with "Shit on the Draft" and "Piss on the Draft," as well as "Fuck the Draft." The breadth of the statute in *Cohen* was a more persuasive ground of distinction, but the Court appeared to rely less on the character of the statute than on the character of the expression.

35. All of the cases in which the Court has stated broad prohibitions against subject matter discrimination involved discrimination against political speech. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (plurality opinion); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980); Carey v. Brown, 447 U.S. 455 (1980); Police Dep't v. Mosley, 408 U.S. 92 (1972); Cox v. Louisiana, 379 U.S. 536 (1965) (Black, J., concurring). *But see* Greer v. Spock, 424 U.S. 828 (1976) (upholding ban against political speakers but not other speakers appearing on military bases); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (upholding ban on political advertising but not commercial advertising on city-owned buses).

In contrast, the Court has routinely upheld subject matter restrictions on labor speech. The Taft-Hartley Act, which imposes numerous restrictions on labor speech but not on other types of speech, has survived repeated challenges. *See, e.g., Safeco*, 447 U.S. 607 (1980). Furthermore, in only one case has a Justice indicated concern over that fact. *See* NLRB v. Fruit & Vegetable Packers' Local 760, 377 U.S. 58, 79 (1964) (*Tree Fruits*) (Black, J., concurring). *See also* Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977) (state may prohibit inmates from advocating prisoners' labor union, and may exclude such advocacy from bulk mailings to inmates from outside sources). *Cf.* DeGregory v. Giesling, 427 F. Supp. 910 (D. Conn. 1977) (upholding ban on labor picketing but not other picketing in residential areas).

36. *See Consolidated Edison Co.*, 447 U.S. at 540; *Bellotti*, 435 U.S. at 786; Buckley v. Valeo, 424 U.S. 1, 25 (1976).

bated.[37] Initially, the Court advanced justifications for protection related to the functioning of both the political[38] and commercial[39] systems. However, it has since retreated from the political rationalization.[40]

Under the Court's current test, commercial speech that is not misleading and does not propose an unlawful transaction can be regulated only if the restriction is no broader than necessary to promote a substantial state interest.[41] Several recent decisions striking down restrictions on commercial speech demonstrate that this test has a critical bite.[42]

Approaching the "black hole" of labor relations, things get fuzzy. The Court has not developed an explicit test for assessing the constitutionality of restrictions on labor speech. Nevertheless, cases involving such restrictions reveal a unique, albeit perplexing, approach. Not only is labor speech accorded less protection than other economic expres-

37. *Compare, e.g.,* Baker, *Commercial Speech: A Problem in the Theory of Freedom,* 62 IOWA L. REV. 1 (1970) (commercial speech should not be protected) *with* Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression,* 39 GEO. WASH. L. REV. 429 (1971) (opposite).

38. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976): "[I]f it [the free flow of commercial information] is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal." (footnotes ommitted).

39. *Id.* at 763-65 (free flow of commercial information in a free enterprise economy helps consumers to make efficient use of their dollars, and thereby fosters overall allocative efficiency).

40. *See, e.g.,* Bolger v. Youngs Drug Products Corp., 103 S. Ct. 2875, 2880-81 (1983) (advertising that "links a product to a current public debate" does not thereby gain the protection generally afforded noncommercial speech); Central Hudson v. Public Serv. Comm'n, 447 U.S. 557, 562 n.5 (1980) (same). *See generally* Jackson & Jeffries, *supra* note 2, at 14-32 (arguing that the Court's protection of commercial speech is grounded solely in the free enterprise values associated with the *Lochner* period).

However, it should be noted that in *Bolger,* the Court reneged on its rejection of the political rationalization and considered the fact that the expression in question (materials related to contraception) conveyed truthful information about "important social issues." 103 S. Ct. at 2882.

41. *See Central Hudson,* 447 U.S. at 566. Thus, it has been observed that "[o]nly the uncertain difference between 'substantial' and 'compelling' now distinguishes the First Amendment standard for most commercial advertising from the First Amendment standard for explicitly political speech." *See* Note, *supra* note 2, at 950.

42. *See, e.g., Bolger,* 103 S. Ct. 2875 (1983) (overturning state statute that banned the mailing of unsolicited advertisements for contraceptives); *In re* R.M.J., 455 U.S. 191 (1982) (overturning state rule of court that banned lawyers from advertising certain nonmisleading information); *Central Hudson,* 447 U.S. at 571-72 (overturning state regulation that banned utilities from advertising to promote the use of electricity).

sion,[43] but expression with political content or purpose, normally entitled to the highest level of protection, may be sucked into the black hole when spoken by labor unions or workers. While the Court sees the distinction between political and commercial speech as one of "common sense,"[44] it finds that political and labor speech cannot be separated because "almost every issue can be viewed by some as political."[45] And, when in doubt, the Court treats borderline expression as labor speech.[46]

The characterization of the labor sphere as a "black hole" is particularly clear in cases dealing with restrictions on speech under the federal labor laws. Rules that prevail outside the labor sphere are strangely reversed. Instead of adjusting its analysis of the labor law to avoid infringing constitutional rights, the Court adjusts its constitutional analysis to avoid upsetting the labor laws' "delicate balance" between union free speech interests and business economic interests.[47]

43. *See* Note, *supra* note 2, at 941-50. The author argues that since the 1940's, the Court has reversed the relative status of commercial advertising and labor picketing. In support of this argument, compare the 1940's cases of Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) ("the Constitution imposes no . . . restraint on government as respects purely commercial advertising") and Thornhill v. Alabama, 310 U.S. 88, 104 (1940) (labor picketing is a protected means of discussing "matters of public interest") with *Central Hudson*, 447 U.S. at 566 (truthful advertising of lawful commercial activity may be restricted only if the restriction is no broader than necessary to promote a substantial state interest) and *Safeco*, 447 U.S. at 616 (upholding injunction against peaceful labor picketing apparently on the ground that labor picketing is inherently coercive).

44. *Ohralik*, 436 U.S. at 455-56.

45. Eastex, Inc. v. NLRB, 437 U.S. 556, 570 n.20 (1978). In *Eastex*, a union distributed a newsletter on company property. The newsletter urged workers to lobby against a right-to-work law, criticized a presidential veto of an increase in the federal minimum wage, and urged workers to register to vote to "defeat our enemies and elect our friends." *Id.* at 569-70. The Court rejected the employer's argument that the newsletter was "political," and thus beyond the scope of the labor law. Instead, it deferred to the Board's judgment that the newsletter bore a sufficient relation to the employees' economic interests to come under the protection of the labor law. *Id. Cf. id.* at 583 n.3 (Rehnquist, J., dissenting) (noting the contrast between the Court's concern with the difficulty of separating political speech from other speech in *Eastex* and its assurance in *Ohralik* that common-sense distinctions could be drawn between political and commercial speech). *See generally* Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism*, 60 TEX. L. REV. 1, 6 (1981).

46. *See, e.g.*, Minnesota State Bd. for Community Colleges v. Knight, 104 S. Ct. 1058 (1984) (public employees' efforts to petition public officials concerning broad issues of public policy treated as labor expression) (discussed *infra* text accompanying notes 130-52); *ILA*, 456 U.S. 212, 225-27 (1982) (union protest against Soviet invasion of Afghanistan treated as labor speech for purposes of constitutional analysis) (discussed *infra* text accompanying notes 219-26).

47. *See Safeco*, 447 U.S. at 617 (Blackmun, J., concurring). *Compare Noerr*, 365 U.S. 127 (1961) (Sherman Act must be construed not to prohibit political expression to avoid conflict with First Amendment values) *with ILA*, 456 U.S. at 225-27 (refusing to exempt political boycott activities by labor unions from the NLRA's prohibition on secondary boy-

This extraordinary judicial deference is rendered more remarkable by the fact that Congress' "delicate balance" turns the First Amendment on its head, valuing and protecting economic expression while leaving political expression relatively unprotected.[48]

Paradoxically, protective labor precedents from the 1930's and 1940's—used to justify constitutional protection for commercial speech[49] and for the economic tactics of civil rights activists[50]—are forgotten in the labor context itself.[51] Principles routinely cited in cases involving the commercial/political distinction are replaced by counter-principles. For example, the principle that laws which "actually affect" the exercise of First Amendment rights cannot be sustained merely because they deal with some evil within the state's legislative competence[52] is replaced with the counterprinciple that an unlawful course of conduct does not gain immunity from regulation "merely because the conduct was in part initiated, evidenced, or carried out by means of language . . . ."[53] Selective restrictions on expression according to its subject matter, generally considered suspect,[54] are afforded reduced scrutiny relative to content-neutral restrictions where the object of discrimination is labor speech.[55] Constitutional issues, dealt with at length in cases involving political or commercial speech, are dispensed with in

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cotts because such a holding would create a "large and undefinable" exception to the statute) *and Eastex*, 437 U.S. at 570 n.20 (refusing to exempt political expression from NLRA's protection of employees' collective bargaining activities in part because "almost every issue can be viewed by some as political").

48. *See* Hyde, *supra* note 45, at 1-11. Hyde suggests this phenomenon is rooted not in the NLRA itself, but in deeply held assumptions about the narrow economic character of American labor unions. *Id.* at 11-14. It should be noted that political activity does not always go without protection under the labor laws. *See, e.g.*, Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, 457 U.S. 702, 719-20 (1982) (Norris-La Guardia Act held to bar federal courts from enjoining a union work stoppage in protest against the Soviet invasion of Afghanistan even though the work stoppage was politically motivated); *Eastex*, 437 U.S. 556 (1978) (discussed *supra* note 45).

49. *Virginia State Bd. of Pharmacy*, 425 U.S. at 762-63 (1976) (citing AFL v. Swing, 312 U.S. 321, 325-26 (1941) and Thornhill v. Alabama, 310 U.S. 88, 103-04 (1940)).

50. *See, e.g., Claiborne*, 458 U.S. 886, 909 (1982) (citing Thornhill v. Alabama, 310 U.S. at 102 and Hague v. CIO, 307 U.S. 496, 501-13 (1939)).

51. The Court failed to cite any of these cases in either of its two recent decisions involving restraints on labor expression under the federal labor law. *See ILA*, 456 U.S. at 212, 225-27; *Safeco*, 447 U.S. at 616.

52. United Mine Workers, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967).

53. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949).

54. *See supra* note 19 and accompanying text.

55. *See infra* text accompanying notes 183-84 (comparing the Court's treatment of general restrictions on picketing with its treatment of restrictions on labor picketing only). It should also be noted that Thornhill v. Alabama, 310 U.S. 88 (1940), the only protective labor picketing decision that still carries any precedential weight, concerned an ordinance granting municipal authorities discretion to ban all kinds of picketing.

a paragraph or two, or bypassed altogether.[56]

In the public sector, conditions are not quite so chaotic. Nevertheless, there is a "sucking in" effect. Commentary on public officials and government operations, speech that falls into even the narrowest content-based definition of political speech,[57] has been treated as virtually unprotected "private" speech in the government employment context.[58] Viewpoint discrimination in access to public property and public officials—normally taboo[59]—has been upheld under a reasonable basis test where the would-be speaker was a public employee or public employees' union.[60]

This Article is primarily concerned with the relationship among the political, commercial, and labor systems. Yet there is a wide variety of expression, most notably artistic and scientific expression, that is at most peripherally related to any of the three systems. This Article stops short of the claim that all speech is or should be evaluated exclusively with reference to one of the three systems. Protection for artistic and scientific expression may be justified either with reference to values of self-government,[61] or with reference to noninstrumental values such as "happiness," "self-fulfillment," or "self-realization."[62] The results and reasoning of the cases are consistent either with the view that noninstrumental values do justify the protection of such speech, but that political speech has priority because it is "more than self-expres-

56. In addition to the other labor cases cited in this part, see Edward J. DeBartolo Corp. v. NLRB, 103 S. Ct. 2926, 2933 (1983); Babbit v. United Farm Workers Nat'l Union, 442 U.S. 289, 312-14 (1979); American Radio Ass'n v. Mobile S.S. Ass'n, 419 U.S. 215, 229-31 (1974).

57. Robert Bork's definition of political speech, generally considered to be the narrowest in the field, includes *inter alia*, all "criticisms of public officials and policies." Bork, *supra* note 26, at 27-28.

58. In *Connick*, 103 S.Ct. 1684 (1983), criticisms of public officials and public policies by an employee were held to constitute "private" expression worthy only of minimal protection. *Id.* at 1694-95 (Brennan, J., dissenting).

59. *See, e.g.*, City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976) (discussed *infra* text accompanying notes 105-09); Police Dep't v. Mosley, 408 U.S. 92 (1972).

60. *See* Minnesota State Bd. for Community Colleges v. Knight, 104 S. Ct. 1058, 1074, 1084-85 (1984) (Stevens, J., dissenting) discussed *infra* text accompanying notes 130-52); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 55, 63-66 (1983) (Brennan, J., dissenting) (discussed *infra* text accompanying notes 110-19). *But see* City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976) (discussed *infra* text accompanying notes 105-09).

61. *See, e.g.*, Meiklejohn, *The First Amendment is an Absolute*, *supra* note 27, at 255-57.

62. *See, e.g.*, Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); L. TRIBE, *supra* note 2, at 576-79; Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 990-1009 (1978); Dworkin, *Introduction*, in PHILOSOPHY OF LAW 1, 13-16 (1977).

sion,"[63] or with the view that the protection of all speech other than commercial and labor speech is justified primarily with reference to the political system, but that some speech is more attenuated in value and thus merits less protection. It should be emphasized that the Court's view of the relative value of all kinds of speech can be explained with reference to the three systems. Indeed, that approach appears to be the one preferred by the Court.[64]

Viewed from the theoretical perspective advanced by Professor Richard Parker,[65] the three-systems ladder may be understood as part of an attempt by the Court to mediate between two underlying polar "pictures" of constitutional order. The first, "transcendent" picture, depicts the essence of constitutional order as derived from the text of the Constitution or from a system of abstract reasoning "disembodied" from and superimposed upon the turbulence and strife of everyday life. The second, "immanent" vision, finds order embodied in the spontaneous political life of the community and hence requires little or no outside enforcement.[66]

In Parker's view, the history of constitutional law may be seen as a series of attempts to mediate between these polar visions.[67] The Court has employed two general strategies of mediation: analysis and synthesis. The analytic strategy divides constitutional issues into two types, those requiring transcendent intervention, and those which can safely be left to the spontaneous operation of the political process. The synthetic strategy, in its modern form, posits that the polity generally functions satisfactorily, but recognizes that occasional malfunctions require judicial intervention.[68]

In this light, the three-systems ladder contains both an analytic and synthetic component. Social reality is analytically divided into three systems, each with a different position on the transcendent-imma-

63. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

64. *See, e.g.*, Board of Educ. v. Pico, 457 U.S. 853 (1982).

65. *See* Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 224-29 (1981); Parker, Political Vision in Constitutional Argument (1979) (on file at Harvard University Law Library).

66. Parker, *The Past of Constitutional Theory*, *supra* note 65, at 224-25.

67. Indeed, it would seem that the Court is fated to be torn by this dichotomy, for a true resolution of the tension between the two polar visions would be inconsistent with the continued survival of judicial review as an institution. Anything short of outright dictatorship would leave the transcendent vision incomplete, since there would still be room for spontaneous political activity and thus a need to distinguish between situations requiring intervention and situations involving healthy spontaneity. Conversely, judicial review would become superfluous were the immanent vision to gain a total victory.

68. For a classic example of this strategy applied to the political system, see J. ELY, *supra* note 18.

nent spectrum. Order in the political system is at the transcendent end of the spectrum and requires a high level of judicial scrutiny and intervention. Order in the labor system is at the opposite, immanent end of the spectrum and can be safely left to Congress. The commercial system lies between these two extremes. Within each sphere, the approach is synthetic.

Not surprisingly, the doctrinal stresses are focused on the system boundaries. The relatively open clash of values revealed by the demarcation of boundaries makes possible relatively settled adjudication within. For example, the existence of the "black hole" of labor relations serves to skew results against workers and unions in both the public and private labor sectors, and thus is open to criticism as an unprincipled judicial attack on workers and unions.[69] But the thumb on the scale is lifted once the boundary of the labor sphere is crossed; the First Amendment claims of employers and workers alike are swallowed up in the black hole.[70] Similarly, the placement of political expenditures and contributions in the sphere of political speech embodies an apparent bias in favor of the wealthy and corporations. Once the boundary is fixed, however, unions as well as corporations may invoke the resulting protection.[71] The same phenomenon is evident all along the system boundaries.[72]

II. Demarcating the System Boundaries

The level of constitutional protection accorded particular expression is determined in part by its identification with one of the three

69. *See infra* text accompanying notes 242-324. The tilt results from the fact that workers are more likely to seek constitutional protection for expressive activities than are employers.

70. The leading case on employer speech is NLRB v. Gissell Packing Co., 395 U.S. 575 (1969). In that case, a company president attempted to convince his employees that they should vote against union representation because a strike " 'could lead to the closing of the plant.' " *Id.* at 588. The Court upheld the NLRB's ruling that this advocacy constituted an unfair labor practice. The employer's First Amendment claim was rejected because his "threat" might unduly influence the employees. *Id.* at 617-19.

71. *See, e.g.*, United States v. CIO, 335 U.S. 106, 121 (1948) (federal law interpreted not to ban union from soliciting and spending funds for publication of periodical advocating congressional candidacy because a contrary construction would raise "the gravest doubt" about the statute's constitutionality).

72. *See, e.g.*, United Mine Workers v. Pennington, 381 U.S. 657 (1965) (extending *Noerr*, 365 U.S. 127 (1961) [Sherman Act held not to prohibit activities directed at influencing government] to cover unions as well as corporations); United Mine Workers, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967) (extending NAACP v. Button, 371 U.S. 415 (1963) [NAACP exempted from state bar solicitation restrictions] to cover unions as well as civil rights organizations).

systems. Hence, the technique of classification has emerged as an important issue in First Amendment adjudication. The Court's complex attempts to demarcate the system boundaries have been of little assistance. However, the cases do reveal a consistent pattern of results.

This part suggests that the cases can be rationalized according to four relatively simple propositions. The boundaries of the three systems are defined in process terms. The definitions focus not on content or motivation per se, but on the flow of speech into and through a system. The four propositions may be stated as follows:

(1) Political speech—i.e., speech that is directed at influencing governmental institutions through external democratic channels[73]—is entitled to the highest level of protection;

(2) Commercial speech—i.e., speech, other than political or labor speech, which is directed at influencing market institutions—is entitled to an intermediate level of protection;

(3) Labor speech—i.e., speech, other than political speech, that is uttered by employers or employees and directed at influencing employers or employees—is virtually unprotected;

(4) Speech that raises grievances concerning racial treatment is entitled to the highest level of protection regardless of which of the three systems is involved. This rule may be viewed as a remedy for malfunctions in all three systems, or as an integrated conception of political and economic life now applied only in the civil rights area.

The boundaries of the three systems are most clearly revealed in cases involving the First Amendment rights of government employees and cases involving the use of economic boycotts to influence the political process. Before reviewing those cases, it will be useful to survey briefly the Court's efforts to provide explicit descriptions of the boundaries.

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73. External democratic channels link the components of what have been called the "exterior" processes of government. J. GALBRAITH, THE ANATOMY OF POWER 146 (1983). Those processes include the voters, the legislature, and the outward-looking face of courts and administrative agencies. Generally, the exterior processes perform the representative functions of a representative democracy. By contrast, the "autonomous" or "interior" processes of government are roughly synonymous with the bureaucracy. In the interior processes, government acts primarily as employer and manager. *Id.* at 145-56, 151.

By "external democratic channels," I mean to include not only the channels themselves (e.g., lobbying and voting) but also the expressive and associational activities directed at influencing people to use them. Further, as will become clear from the analysis below, the external channels need only be the last link in a chain of interactions. For example, a boycott of privately owned convention facilities designed to pressure indirectly the state legislature would fall within the realm of political association and expression.

A. The Court's Stated Demarcations

Initially, the Court attempted to state generally applicable, content-based definitions of political and commercial speech. Political or public speech was variously defined as speech that concerned "the manner in which government is operated or should be operated,"[74] "persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues,"[75] and as commentary upon "matters of public interest."[76] Commercial speech was defined as "speech which does 'no more than propose a commercial transaction,' "[77] and, much more expansively, as "expression related solely to the economic interests of the speaker and its audience."[78]

All of these definitions conflict with the Court's own practice. Speech which is clearly "political" or "public" according to any of the Court's definitions has been afforded no protection when uttered within the labor relations system.[79] Conversely, expression related solely to the economic interests of the speaker and its audience has been termed "political" and accorded the highest level of protection.[80]

Recently, the Court has employed a flexible, multifactor approach in classifying particular types of speech. In *Bolger v. Youngs Drug Products Corp.*,[81] for example, a drug company mailed out unsolicited advertisements for contraceptives. Most of the mailed materials consisted solely of information concerning products for sale and thus fell "within the core notion of commercial speech—'speech which does no more than propose a commercial transaction.' "[82] But the mailings also included pamphlets that combined product descriptions with informa-

74. Mills v. Alabama, 384 U.S. 214, 218 (1966).

75. Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980) (solicitation by environmental protection group was not commercial speech). *See also* Carey v. Brown, 447 U.S. 455, 466-67 (1980).

76. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968). *See also* New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (advertisement concerning events that occurred during a civil rights demonstration was not mere commercial speech because it "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives [were] matters of the highest public interest and concern").

77. *Virginia State Bd. of Pharmacy*, 425 U.S. at 762 (quoting Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973)).

78. *Central Hudson*, 447 U.S. at 561.

79. *See, e.g., ILA*, 456 U.S. 212 (1982) (protest against Soviet invasion of Afghanistan); Minnesota State Bd. for Community Colleges v. Knight, 104 S. Ct. 1058 (1984) (commentary on broad issues of public educational policy).

80. *See, e.g., Noerr*, 365 U.S. 127 (1961) (advertising by railroad interests attacking the trucking industry).

81. 103 S. Ct. 2875 (1983).

82. *Id.* at 2880 (quoting *Virginia State Bd. of Pharmacy*, 425 U.S. at 762).

tion concerning the desirability and availability of contraceptives in general. In classifying these pamphlets, the Court looked at several other factors: the overall character of the pamphlets as "advertisements," the mention of specific products, and the drug company's "economic motivation" for mailing the pamphlets.[83] Although none of these factors by itself was determinative, the combination of all was sufficient to indicate the commercial character of the pamphlets.[84] The Court emphasized the flexible character of its approach, disclaiming any intention to set forth a definitive test or to cover situations other than the one with which it was presented.[85] Likewise, in *Connick v. Myers*,[86] the Court considered the "content, form, and context" of a questionnaire circulated by a government employee among her coworkers[87] before deciding that it was an "employee grievance concerning internal office policy" and thus of limited First Amendment value.[88]

Though the opinions in *Bolger* and *Connick* set forth indeterminate multi-factor tests, they do hint at the logic underlying the Court's approach to the classification of expression. In *Bolger*, the Court adjusted the level of protection to the systemic context. Because the drug company could separately disseminate its "direct comments on public issues" with full constitutional protection, the Court concluded that there was "no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions."[89] This conclusion suggests that expression which is valuable to the political system need not be given special protection when its contribution to that system is not contingent upon expression in the context of the commercial marketplace. Thus, systemic context and values, not content or motivation, are the critical factors.

83. 103 S. Ct. at 2880.

84. *Id.*

85. *Bolger*, 103 S. Ct. at 2880 n.14.

86. 103 S. Ct. 1684 (1983).

87. *Id.* at 1690.

88. *Id.* at 1693-94.

89. *Bolger*, 103 S. Ct. at 2881. As noted above, the Court in *Connick* also considered the institutional context in classifying speech. *See Connick*, 103 S. Ct. at 1690. Edwin Baker suggested a similar approach some years ago. *See* Baker, *supra* note 37, at 22-23.

B. The Three-Systems Ladder in Operation: The Government Employee Cases[90]

The operation of the Supreme Court's process-oriented demarcations shows up clearly in cases involving the First Amendment rights of government workers. Prior to the 1960's, public employment was generally deemed a "privilege" that could be withdrawn at will.[91] For example, in *Adler v. Board of Education*,[92] the Court upheld a New York statute that barred members of "subversive" organizations from public employment, in part because teachers had "no right to work for the State . . . on their own terms."[93] In a series of cases dealing with loyalty requirements, however, the Court gradually ate away at this right-privilege doctrine.[94] Finally, in *Keyishian v. Board of Regents*,[95] the Court effectively reversed *Adler* and explicitly repudiated the doctrine as applied to public employment.[96]

In *Pickering v. Board of Education*,[97] the Court extended *Keyishian* to protect expression by public employees. Mr. Pickering was fired from his position as a high school teacher for writing a letter to the editor of a local newspaper. The letter criticized the school board for "totalitarianism" in pressuring teachers to support a bond referendum and for misallocating funds to athletic rather than academic needs.[98] On these facts, the Court determined that Pickering's dismissal violated the First Amendment.[99]

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90. All of the cases discussed in this section involve "nonpolicymaking" employees of state or local government. Cases involving federal civil service employees fall within the exclusive jurisdiction of the Civil Service Commission. *See* Bush v. Lucas, 462 U.S. 367 (1983). Policymaking employees may be discharged at will. *See* Elrod v. Burns, 427 U.S. 347, 367-68 (1976) (plurality opinion) (dictum).

91. In the words of Oliver Wendell Holmes, a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892). *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1439-42 (1968). *But see* Wieman v. Updegraff, 344 U.S. 183 (1952) (state cannot condition employment on the extraction of an oath denying past affiliation with the Communist Party).

92. 342 U.S. 485 (1952).

93. *Id.* at 492.

94. The Court reviewed this history in *Connick*, 103 S. Ct. 1684, 1688-89 (1983).

95. 385 U.S. 589 (1967).

96. *Id.* at 605-06.

97. 391 U.S. 563 (1968).

98. *Id.* at 575-78.

99. *Id.* at 565. The Court held that when a teacher acts as a member of the general public, "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." *Id.* at 574 (footnote omitted).

The Court, speaking through Justice Marshall, described the problem as one of arriving at "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[100] Because this test considered only the interests of the teacher *as a citizen* (rather than employee), the determination of whether he was acting as a citizen logically preceded the balancing of the free speech and governmental interests. In making this determination, the Court considered the subject matter and institutional context of the teacher's speech. It found that the subject matter encompassed "matters of legitimate public concern"[101] and was only "tangentially and insubstantially" involved with the fact of employment.[102] Furthermore, the speech was directed at the public and not at "any person with whom appellant would normally be in contact in the course of his daily work as a teacher."[103] The Court concluded that the teacher should be regarded as a member of the general public and that on balance his constitutional rights had been violated by the dismissal.[104]

Pickering reveals the concern with the boundary between the political and labor relations systems that runs throughout the government employee cases. The Court's analysis splits the employee and the government institution each into two distinct identities. The employee may speak either as a "citizen" whose expression is valuable to the functioning of the political system, or as an "employee" whose expression threatens the efficiency of government operations. Correspondingly, the government institution may restrict speech either as the voice of the majority, with no legitimate interest in suppressing individual expression, or as an employer, with a legitimate interest in promoting efficiency.

In *City of Madison v. Wisconsin Employment Relations Commission* (*WERC*)[105] the Court made it clear that the content of expression was not decisive in the *Pickering* analysis: employee speech concerning labor contract negotiations and terms and conditions of employment would be protected provided the speech was aimed at the political process. In *WERC*, a nonunion teacher was permitted to speak at a public school board meeting called in the midst of contract negotiations be-

100. *Id.* at 568.
101. *Id.* at 571.
102. *Id.* at 574.
103. *Id.* at 569-70.
104. *Id.* at 574-75.
105. 429 U.S. 167 (1976).

tween the board and a union that was certified under state law as the exclusive bargaining representative of the teachers in the system. The teacher questioned the value of a union proposal that would have required all teachers, whether or not they were members of the union, to pay an agency fee to the union to defray the costs of bargaining. The Wisconsin Employment Relations Commission determined that the school board had violated the state's labor law by negotiating directly with the teacher in derogation of the union's status as exclusive bargaining representative. Accordingly, the Commission ordered the school board not to permit teachers other than union representatives to speak at meetings concerning collective bargaining.

At first glance, it appeared that the Commission occupied a strong legal position. The employment-related content of the expression in *WERC* contrasted starkly with the expression in *Pickering*. Moreover, in *WERC*, the state clearly had a strong interest as an employer in protecting the role of the exclusive bargaining representative in its system of public employee labor relations.[106] Nevertheless, the Court overturned the Commission's order, holding that the teacher's appearance before the school board was protected expression under the First Amendment.[107] As in *Pickering*, the reasoning hinged on the value of expression by the teacher "as a concerned citizen."[108] What made his speech "public," in spite of its employment-related content, was the fact that the meeting was open to the public and thus constituted a

106. *Id.* at 178-79 (Brennan, J., concurring). The crucial role of exclusive bargaining representatives in stabilizing labor relations had been recognized by the Court in cases involving the federal labor laws. *See, e.g.*, Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 62 (1975) (holding that attempts by minority workers to negotiate directly with management were not protected under the federal labor laws: "Central to the policy of fostering collective bargaining, where the employees elect that course, is the principle of majority rule."); J.I. Case Co. v. NLRB, 321 U.S. 332 (1944) (employer may not circumvent the structure of collective bargaining contained in the federal labor law by negotiating individual contracts with employees).

107. *WERC*, 429 U.S. at 176-77.

108. *Id.* at 175-76. The Court also relied in part upon the fact that the teacher was not attempting to negotiate an agreement on the spot, which, in any case, he was not authorized to do. *Id.* at 174. This consideration, however, merely restates the fact that the union was the exclusive bargaining representative. The purpose of prohibiting direct talks with individual workers is not to prevent the negotiation of an agreement, which would be illegal anyway. Instead, the purpose is to prevent the undermining of the exclusive bargaining representative, a result that appears to have occurred in *WERC* since the school board acceded to all of the union's demands except for the one challenged by the teacher at the meeting. *Id.* at 172. *Cf. In re* Sam'l Bingham's Son Mfg. Co., 80 N.L.R.B. 1612 (1948) (employer may not speak individually with striking workers to urge them to return to work).

recognized channel for citizens to communicate with government.[109]

Perry Education Association v. Perry Local Educators' Association[110] involved issues similar to those in *WERC*, but came out the other way. There, a school board negotiated a collective bargaining agreement that permitted a teachers' union to circulate its notices through the school mailbox system. A rival union was denied access. The favored union had been certified as the exclusive bargaining representative for the teachers in the system after an election victory over the rival union. In addition to the majority union, outside organizations such as the YMCA, Cub Scouts, and parochial schools were permitted to use the mail system.

In a 5-4 decision, the Court upheld the selective access policy. As in *WERC*, the Court treated the issue partly as a public forum question. Justice White, writing for the majority, reasoned that the mailbox system was "not by tradition or designation a forum for public communication." Hence, to pass constitutional muster the restriction only had to be "reasonable" and not motivated "merely" by opposition to the speaker's views.[111]

A closer look at the opinion, however, suggests that the citizen-employee dichotomy was more important to the result than the public forum analysis. The latter was painfully circular.[112] The Court acknowledged that selective access to forums that were public by state designation would be subject to strict scrutiny.[113] But the school mailbox system in *Perry* was not such a forum. Why? Because the board had granted only selective access.[114]

109. *WERC*, 429 U.S. at 175-77. The Court's reference to the meeting as a public forum adds nothing to this analysis. Expression concerning terms and conditions of employment has been suppressed on the basis of content when that expression is not directed to a recognized democratic channel regardless of whether it takes place in a public forum. *See generally* Lo Burgio, *Federal Employee Picketing: Regulation of a Privilege*, 21 A.F. L.R. 330. (1979).

110. 460 U.S. 37 (1983).

111. *Id.* at 46.

112. *See* L. TRIBE, CONSTITUTIONAL CHOICES, *supra* note 19.

113. 460 U.S. at 45. In those situations, the government is bound by "the same standards which apply in a traditional public forum." Thus, content-based restrictions are permitted only when the state can "show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.*

114. "This type of selective access [admission of various civic and church organizations such as the YMCA and Cub Scouts] does not transform government property into a public forum." *Id.* at 47. The Court cited Greer v. Spock, 424 U.S. 828 (1976) (upholding ban on political but not other speakers on military base) and Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (upholding ban on political but not other advertising in city-owned buses) for this proposition. But neither *Greer* nor *Lehman* involved a forum whose explicit purpose was communicative. *See* L. TRIBE, *supra* note 2, at 690-91. The dissent in *Perry* vigorously

Perhaps to mitigate this apparent circularity, the Court suggested that there was no constitutional problem in discriminating *against labor unions.* Even if the mailbox system were a "limited" public forum, access for organizations that "engage in activities of interest and educational relevance to students," like the girl scouts or a local boys' club, would not open it up to an organization like the minority union that was "concerned with the terms and conditions of teacher employment."[115] This line of reasoning ignored the fact that the board had opened the mailbox system not only to organizations that engaged in activities of relevance to students, but also to the majority union, which was concerned with the terms and conditions of teacher employment.

The climax of the opinion, as far as the "black hole" character of labor speech is concerned, was the Court's treatment of the apparent viewpoint discrimination among the two directly competing labor unions.[116] Having found that the exclusive access policy was not motivated by viewpoint discrimination,[117] the Court turned around and determined that it was justifiable in part because "exclusion of the rival union may reasonably be considered a means of insuring labor-peace within the schools."[118] How the restriction on access accomplished that end, other than by suppressing the minority union's viewpoint, was left unexplained.[119] The decision in *Perry* appears more logical, though not necessarily defensible, if interpreted to stand for the simple proposition that attempts to influence governmental labor relations policy are subject to minimal or no constitutional scrutiny when advanced outside of external democratic channels.

This proposition was confirmed two months later in *Connick v.*

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criticized the majority's public forum analysis as an irrelevant obfuscation of the underlying issue relating to viewpoint discrimination. 460 U.S. at 57-62 (Brennan, J., dissenting).

115. *Perry*, 460 U.S. at 48.

116. *Id.* at 63-66 (Brennan, J., dissenting).

117. *Id.* at 48-49.

118. *Id.* at 52. The mere potential for future harm was sufficient. *Id. But cf. WERC*, 429 U.S. at 175-76 (recognizing that discrimination between the views of a majority union and nonunion employees constitutes viewpoint discrimination). Although viewpoint discrimination in the labor relations context might be justified in some circumstances, such as during negotiations or grievance sessions, it certainly should be subjected to the strict scrutiny applied to other viewpoint discrimination. *See Perry*, 460 U.S. at 65-66 (Brennan, J., dissenting).

119. The Court also found that the "status" of the majority union as exclusive bargaining agent was a "reasonable" basis for the differential access provided the two unions. 460 U.S. at 48-54. But, as the dissent pointed out, the policy was both underinclusive, because it granted the majority union access for communications unrelated to its status as bargaining representative, and overinclusive, because outside organizations with no special status enjoyed access privileges. *Id.* at 66-67 (Brennan, J., dissenting).

Myers,[120] this time without the confusing public forum rhetoric. In *Connick*, Sheila Myers, an assistant district attorney, was discharged for circulating a questionnaire to her coworkers. The questionnaire concerned such matters as transfer policy, office morale, the reliability of certain supervisors, and pressure placed upon employees to engage in political campaigning for candidates supported by the office. Again by a 5-4 vote the Court upheld the discharge.[121]

Justice White's majority opinion for the first time laid out the two-step analysis hinted at in *Pickering*. First, the Court must determine whether the worker spoke as a "citizen upon matters of public concern" or as an "employee upon matters only of personal interest."[122] If the former, then the *Pickering* balancing test is applied to assess the constitutionality of the discharge. If, however, the worker spoke only on matters of personal interest, the First Amendment claim is rejected "absent the most unusual circumstances."[123]

The Court's application of this approach in *Connick* provides an extraordinarily clear example of judicial assessment of the worth of speech. Myer's motivation and sincerity were probed and derided.[124] The value of the particular content, both subject matter and viewpoint, was evaluated. The Court found that the question in Myers's survey concerning pressure to work on political campaigns implicated a "matter of public concern" in part because "there is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service."[125] It is hard to interpret this statement as indicating anything other than that speech which supports government policies is entitled to more protection than speech which criticizes them—a peculiar reversal of First Amendment concerns.[126] The majority's interpretation of precedents was equally problematic. Justice White ignored *WERC* in order to support his formulation of the test as centering on whether the content of the em-

120. 103 S. Ct. 1684 (1983).

121. *Id.* at 1694. With two exceptions, the alignment of Justices was identical to that in *Perry*. Justice White, who dissented in *Perry*, changed places with Justice Stevens.

122. *Id.* at 1690.

123. *Id.* at 1689-90.

124. "[T]he focus of Myers' questions is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors. These questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre." *Id.* at 1691 (footnote omitted).

125. *Id.*

126. The First Amendment protects against government suppression of speech. Obviously, the free speech guarantee would be of little use if it protected only speech that is consistent with government policy. *See id.*, at 1698 (Brennan, J., dissenting) (citing New York Times v. Sullivan, 376 U.S. 254, 270 (1964)).

ployee's expression involved "matters of public concern."[127]

None of these questionable lines of reasoning, however, were necessary to support the result in *Connick.* One of the factors considered by the Court was the internal office setting of Myers's expression.[128] Under the logic of *Pickering* and its progeny, the fact that Myers attempted to influence government labor relations policy in such a setting—that is, without going through external democratic channels—would have been sufficient to support the Court's conclusion that her expression was entitled only to minimal constitutional protection.[129]

The Court's most recent decision concerning the First Amendment rights of government employees, *Minnesota State Board for Community Colleges v. Knight,*[130] rounds out the process distinction between political and labor speech in the government employee context. It has been seen that speech aimed at influencing government through external channels is protected whether it concerns conditions of employment[131]

127. "Our cases following *Pickering* also involved speech on matters of public concern." 103 S. Ct. at 1689 (citing Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979), Mt. Healthy School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) and Perry v. Sindermann, 408 U.S. 593 (1972)). The Court studiously avoided citing *WERC,* which held speech on contract negotiations and terms, and conditions of employment to be protected. The dissent pointed out that a judge's determination of what is and what is not an issue of public concern involves a "sensitive" inquiry. 103 S. Ct. at 1699 (Brennan, J., dissenting). This point is worth emphasizing because the Court has consistently used the phrase "matters of public concern" to distinguish between govenment employees' expression as citizens and as employees. As the Court recognized in *WERC,* 429 U.S. at 177, almost every issue concerning the operation of a school system could also be characterized as a potential subject of collective bargaining. Furthermore, the Court recognized in *Connick,* 103 S. Ct. at 1691, that almost all internal office matters could be of public concern. The only interpretation of the phrase "matters of public concern" which would seem to give it independent meaning—that it signifies *actual* public concern—was apparently rejected in *Connick,* 103 S. Ct. at 1697 n.2 (Brennan, J., dissenting) (extensive local press coverage indicated that the matter was actually of public concern).

128. 103 S. Ct. at 1693.

129. Instead, the Court found it necessary to utilize the *Pickering* balancing test. Although Myers' expression was for the most part of personal interest only, the question on political pressure touched on a matter of public concern. Applying the balancing test, the Court held that the state's interest in preventing possible future disruption of the office justified suppressing expression which was "most accurately characterized as an employee grievance concerning internal office policy." *Id.* at 1693-94. As the dissent pointed out, however, consideration of the public character of the expression in the balancing stage of the analysis as well as in the initial stage of determining whether to invoke the analysis effectively weighed that factor twice. *Id.* at 1695-96 (Brennan, J., dissenting).

130. 104 S. Ct. 1058 (1984).

131. *See* City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976) (discussed *supra* notes 105-09 and accompanying text). *See also* Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (untenured teacher not rehired for making critical remarks to a radio station concerning dress code imposed on

or other issues.[132] But, as the decisions in *Perry* and *Connick* indicate, speech aimed at influencing labor relations policy through internal channels is effectively unprotected.[133] In *Knight*, the Court extended *Perry* and *Connick* to deny protection to employees who attempted to influence a broad range of government policies through internal channels.

Knight involved a challenge to Minnesota's Public Employment Labor Relations Act (PELRA). PELRA provided for two types of formally organized communication between public workers and their employers. First, it required public employers to "meet and negotiate" with exclusive bargaining representatives—that is, majority unions—concerning "terms and conditions of employment."[134] Second, it directed employers to "meet and confer" with those exclusive representatives concerning public policy issues not within the scope of the "meet and negotiate" process.[135] The law prohibited public employers from engaging in either of the two processes with any employees other than those selected by the exclusive representatives.

Twenty community college instructors who were not members of the majority union brought suit to challenge their exclusion from the two channels of communication. Predictably, their claim involving the "meet and negotiate" sessions—labor speech under both content and process definitions—was summarily rejected by a three-judge panel of

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teachers would be entitled to reinstatement if the remarks were the "but-for" cause of the decision not to rehire him).

132. *See* Pickering v. Board of Educ., 391 U.S. 563 (1968) (discussed *supra* notes 97-104 and accompanying text). The Court's consistent approval of statutory bans on political campaigning by public employees, *see, e.g.*, United States Civil Serv. Comm'n v. Letter Carriers, 413 U.S. 548 (1973) and United Public Workers v. Mitchell, 330 U.S. 75 (1947), qualifies but does not invalidate this generalization. Those cases may be explained in terms of the government's interest in preventing an official from compelling employees to work for the official's re-election. Where that governmental interest is not present, political activities are protected. *See, e.g.*, Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976).

133. *See Perry*, 460 U.S. 37 (1983) (discussed *supra* notes 110-19 and accompanying text); *Connick*, 103 S. Ct. 1684 (1983) (discussed *supra* notes 120-29 and accompanying text).

134. The state workforce was divided into bargaining units. The employees of each unit selected their exclusive representative by majority vote. *Knight*, 104 S. Ct. at 1060-61.

PELRA defines "terms and conditions of employment" to include: "the hours of employment, the compensation therefor including fringe benefits except retirement contributions or benefits, and the employer's personnel policies affecting the working conditions of the employees. In the case of professional employees the term does not mean educational policies of a school district." *Id.* at 1075.

135. If the employees in a given bargaining unit had selected an exclusive representative for the "meet and negotiate" process, that representative was also certified for the "meet and confer" process. Otherwise, the employees could select a representative specifically for the "meet and confer" process. *Id.* at 1060-61.

the district court, and by the Supreme Court itself.[136] On the "meet and confer" issue, however, the instructors prevailed in the district court and provoked a barrage of opinions in the Supreme Court.

The "meet and confer" issue forced a showdown between the definition of political speech based on process and the various definitions based on content and motivation.[137] The "meet and confer" sessions had been set up for the express purpose of dealing with issues other than terms and conditions of employment. Sessions had covered such topics as school finances, student affairs, and the content of public instruction.[138] Hence, the subject matter of those sessions fell squarely within the political sphere as defined either by content or by motivation. Under those definitions, the instructors' rights of free expression and association, as well as their right to petition the government, were all affected by restrictions on access to the "meet and confer" sessions.

The Court, however, held that no First Amendment rights were infringed.[139] Justice O'Connor, writing for the majority, framed her analysis in process terms. The instructors' free speech claims failed because of the institutional context and target of the expressive and associational activities. The instructors could not rely upon public forum cases like *WERC*, because the meet and confer sessions were not open to the public. Nor could they turn to nonpublic forum cases like *Police Department of Chicago v. Mosley*,[140] because those cases involved speech aimed at "private individuals or public officials not acting in an official capacity"[141] instead of direct communication with public policymakers as in *Knight*. In short, both the speakers and listeners in *Knight* were participating in the internal processes of government.

Stripped of support from both the public forum and the nonpublic forum cases, the instructors were left with the bald-faced assertion that they enjoyed the right "to force officers of the state acting in an official policymaking capacity to listen to them in a particular formal setting."[142] The Court easily dispensed with that claim, reasoning that

136. *See id.* at 1063 (referring to its earlier summary affirmance of the district court judgment [Knight v. Minnesota Community College Faculty Assoc., 571 F. Supp. 1, 3-5 (D. Minn. 1982)] on that issue).

137. These definitions are set forth *supra*, text accompanying notes 73-78.

138. *Knight*, 104 S. Ct. at 1062.

139. *Id.* at 1068.

140. 408 U.S. 92 (1972) (ordinance banning all picketing except peaceful labor picketing within 150 feet of a public school unconstitutionally discriminated on the basis of speech content).

141. *Knight*, 104 S. Ct. at 1065, n.8.

142. *Id.* at 1065.

government officials must have the power to choose their advisors.[143] Accordingly, the instructors' free speech challenge failed.[144]

In his dissenting opinion, Justice Stevens vigorously argued that because the "meet and confer" provisions of PELRA restricted expression concerning the full range of public policy, those provisions infringed important First Amendment rights.[145] Furthermore, the "meet and confer" process permitted the majority union to express its own viewpoint while prohibiting others from doing the same. Thus, Minnesota had committed the cardinal sin of engaging in viewpoint discrimination.[146] Though Justice Stevens approved of viewpoint discrimination where necessary to serve the state's compelling interest in safeguarding the collective bargaining process,[147] he maintained that it should be prohibited altogether outside of that limited area.[148]

With Justice O'Connor's opinion in *Knight*, the Court has finally begun to demarcate the system boundaries in explicit process terms. Her opinion, however, continues to blur those boundaries in important respects. The two factors she relied upon—the absence of a public forum and the attempt to communicate directly with government policymakers—serve only as unwieldy surrogates for the distinction between external and internal channels of communication.

This imprecision is highlighted in *Knight* by the puzzling failure of any of the Justices to cite *United Mine Workers v. Pennington*.[149] In *Pennington*, the United Mine Workers Union and a number of large coal operators jointly petitioned the Secretary of Labor to establish high minimum wage levels for employees of TVA contractors. A small operator charged that the union had violated the Sherman Act by conspiring to set minimum wage levels so high that smaller companies would be unable to compete for TVA contracts. The Court rejected this

143. *Id.* at 1068.

144. With only brief discussion, the Court also rejected the instructors' contentions that PELRA violated their rights of free association and equal protection under the laws. *Id.* at 1068-69.

145. *Id.* at 1075 (Stevens, J., dissenting).

146. *Id.* at 1075-77, 1083-85.

147. *Id.* at 1082-83.

148. "The First Amendment favors unabridged communication among members of a free society—including communication between employer and employee. The process of collective bargaining requires that a limited exception to that general principle be recognized, but until today we have not tolerated any broadening of that exception beyond the collective bargaining process. The effect of the Minnesota statute is to make the union the only authorized spokesman for all employees on political matters as well as contractual matters. In my opinion, such state sponsored orthodoxy is plainly impermissible." *Id.* at 1086.

149. 381 U.S. 657 (1965).

charge, reasoning that the alleged conspirators had directed their efforts solely at influencing public officials.[150] The Court relied upon *Eastern Railroad Presidents Conference v. Noerr Motor Freight*,[151] which had held that concerted efforts to influence public officials could not be prohibited under the Sherman Act in view of the First Amendment right to petition the government.

Justice O'Connor's reasoning in *Knight* cannot be reconciled with the decision in *Pennington*. As in *Knight*, the communicative activities in *Pennington* were not conducted in a public forum, and consisted of direct contacts with policymakers. Thus, both factors relied upon by Justice O'Connor—a nonpublic forum and a policymaker listener—were also present in *Pennington*. Further, to the extent that the instructors in *Knight* were seeking to "force" government policymakers to listen to them, so was the union in *Pennington*. In both cases, the officials in question were willing to listen, but the communication was banned by statute.[152] In short, Justice O'Connor's two-pronged reasoning does not serve to distinguish *Knight* from *Pennington*.

The two cases can be reconciled, however, by applying the process definition of political expression set forth in this Article. Political expression is defined as expression directed at influencing government through external channels—that is, channels open, at least formally, to citizens as citizens. The union in *Pennington* petitioned the Secretary of Labor through an external channel. In contrast, the instructors in *Knight* sought access to an internal channel open only to government employees in their capacities as employees.

One major case involving the First Amendment rights of government employees remains to be discussed. At first glance, *Givhan v. Western Line Consolidated School District*[153] appears to throw a wrench into the process demarcations. Bessie Givhan was fired from her job as a teacher in retaliation for criticizing the school's "employment policies and practices," which she considered to be racially discriminatory.[154] Givhan had communicated these views to her employer in the privacy of the principal's office. According to the process definitions of speech developed above, her speech clearly fell in the "private" or labor category, subject to minimal or no constitutional protection. Nevertheless,

150. *Id.* at 670.

151. 365 U.S. 127, 136-40 (1961) (discussed *infra* text accompanying notes 204-08).

152. *See Knight*, 104 S. Ct. at 1081 (Stevens, J., dissenting) (noting that the college administrators in *Knight* claimed that they were willing to listen to the views of the instructors and that only the provisions of PELRA prevented the communication).

153. 439 U.S. 410 (1979).

154. *Id.* at 413.

the Court held that her expression did not constitute a legitimate basis for discharge. Justice Rehnquist's terse opinion for a unanimous Court focused primarily on the distinction between speech in public and speech in private, and concluded that the public context of the expression in earlier cases had not been critical to the results.[155] *Connick*, with its emphasis on the internal office context of Myers' speech, would seem virtually to overrule *Givhan*.

Viewed solely in relation to other government employee cases, *Givhan* appears as an anomalous departure from the process demarcations. However, when other First Amendment cases are added to the picture, it is apparent that *Givhan* is merely one example of a general exception to the three-systems approach. In cases involving expression raising racial grievances, the Court has consistently departed from the process definitions, affording constitutional protection regardless of institutional context.[156] Though the *Givhan* opinion did not expressly acknowledge this exception, the *Connick* opinion relied on it to distinguish *Givhan*. The Court observed that racial discrimination—in contrast to a "personal" employment dispute—is "a matter inherently of public concern."[157]

In conclusion, the Court has, in rough outline, staked out the process boundary between political and labor expression in the government employee context. Expression aimed at influencing government policy is protected—regardless of content and motivation—when advanced through external channels.[158] Conversely, such expression is not generally protected when advanced through internal channels.[159] The Court, however, has recognized an exception for expression concerning racial grievances, which is protected whether advanced through external or internal channels.[160]

C. The Three-Systems Ladder in Operation: The Boycott Cases

Boycotts and the expressive activities associated with them[161] have

155. *Id.* at 414-15 (discussing Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Perry v. Sinderman, 408 U.S. 593 (1972); Pickering v. Board of Educ., 391 U.S. 563 (1968)). For a detailed analysis of this aspect of *Givhan*, see Schauer, *"Private" Speech and the "Private" Forum:* Givhan v. Western Line School District, 1979 SUP. CT. REV. 217.

156. *See infra* text accompanying notes 198-203, 209-15. The theoretical basis for this exception is discussed *infra* text accompanying notes 268-301.

157. *Connick*, 103 S. Ct. at 1691 n.8.

158. *See supra* notes 131-32 and text accompanying notes 97-109.

159. *See supra* text accompanying notes 110-19, 134-52.

160. *See supra* text accompanying notes 153-56.

161. The term "boycotts" as used here refers to any organized withholding of patronage, capital, or labor. Boycott activities may be divided into two types, either or both of which

been banned or regulated under the common law,[162] antitrust legislation,[163] and the labor laws.[164] Prior to the 1930's, not only were boycott activities constitutionally unprotected, but the Court suggested that the interests justifying their prohibition were of constitutional dimension.[165] However, the Supreme Court has recently held that "political" boycotts are protected under the First Amendment.[166]

The boundary between political and labor expression in the boycott area is obscured by layers of empty doctrine. The open articulation of the "citizen-employee" dichotomy in the government worker cases has no counterpart in the boycott area. Instead, two apparently neutral doctrines—the speech-conduct distinction and the unlawful objective test— conceal the differential treatment of labor and other expression. Beneath those disguises, the three-systems ladder shapes the pattern of results.

The first—and in many ways, the most interesting—case was that of *Gompers v. Bucks Stove & Range Co.*[167] decided in 1911. The case arose when three high-ranking officials of the American Federation of Labor, including Samuel Gompers, were convicted of contempt of court for violating an injunction that barred them from publicizing "in

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may be employed in a given boycott: (1) an agreement among a group of people to withhold patronage or labor, generally called a "concerted refusal to deal"; and (2) the expressive activities used to maintain, enforce, and expand a boycott. It has been suggested that these two types of activity should be treated differently under the First Amendment. *See* Note, *Political Boycott Activity and the First Amendment*, 91 HARV. L. REV. 659, 686-87 (1978) (concerted refusals to deal should be accorded less protection than public appeals to boycott). This distinction is grounded in a distrust of intermediate organizations. Because this distrust permeates—and perhaps even forms the basis of—debate over expressive boycott activities as well, *see infra* notes 292-95 and accompanying text, this Article treats the two types of activity as parts of a single phenomenon.

162. Under the common law, boycotts constituted "tortious interference" with a merchant's business. *See, e.g.*, Ertz v. Produce Exch. Co., 79 Minn. 140, 81 N.W. 737 (1900) (boycott against merchants by suppliers); Boutwell v. Marr, 71 Vt. 1, 42 A. 607 (1899) (trade association boycott against nonmembers); Vegelahn v. Guntner, 167 Mass. 92, 44 N.E. 1077 (1896) (boycott against employer by employees).

163. For cases prohibiting boycotts under § 1 of the Sherman Act, 15 U.S.C. § 1, see Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild Inc. v. FTC, 312 U.S. 457 (1941); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914).

164. *See, e.g.*, Labor-Management Relations Act § 8(b)(4), 29 U.S.C. § 158(b)(4) (1976) (banning secondary boycotts).

165. *See* Truax v. Corrigan, 257 U.S. 312 (1921) (state denial of injunctive remedy against labor boycott violated Equal Protection Clause).

166. *Claiborne*, 458 U.S. at 913.

167. 221 U.S. 418 (1911). Commentators have generally ignored *Gompers* and other pre-World War I cases. Recent scholarship, however, has unearthed these cases. *See* Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981).

any manner" a boycott against the Bucks Stove & Range Company.[168] The officials had violated this injunction by announcing the boycott in speeches and labor publications.[169]

Although the Court reversed the convictions on procedural grounds,[170] it first unanimously rejected the defendants' First Amendment claim, reasoning that the union's boycott publicity constituted "verbal acts," not speech.[171] The formation of unions had created a "vast power, in the presence of which the individual may be helpless."[172] The Court alluded to two types of coercion that could result from the exercise of this power. First, unions might intimidate laborers and consumers asked to boycott a business. Slogans such as "Unfair" and "We don't patronize," when used by massive organizations like unions, take on "a force not inhering in the words themselves."[173] The slogans would merely "signal" the obedience of the workers. The Court did not attempt to explain why this "force" would hold sway over the workers, or how it could be transmitted via spoken and printed advocacy.[174]

Second, an organized boycott could exert a coercive influence on owners of property. An individual confronted with union power could only surrender or go to court for an injunction.[175] Unfortunately, the Court did not elaborate on why this coercion, which resulted solely from the peaceful persuasion of workers and consumers, was so evil as to warrant suppression. In short, the *Gompers* opinion set up an apparently neutral distinction— that between "verbal acts" and speech—but let slip a strong hint that behind this distinction lay a visceral fear of organized working people.

168. 221 U.S. at 420-421, n.l.

169. *Id.* at 423.

170. *Id.* at 451-52. The Court held that a settlement of the main civil action between the labor union and the company "necessarily ended" the civil contempt proceedings in the case; thus, the convictions of the defendants were set aside because those convictions had resulted from the civil contempt proceedings.

171. *Id.* at 439.

172. *Id.*

173. *Id.*

174. *Cf.* Hughes v. Superior Court, 339 U.S. 460, 465 (1950) (Frankfurter, J.) ("The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word").

175. "[Union power], when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights, and appealing to the preventive powers of a court of equity." *Id.* It is safe to assume that the constitutional rights to which the Court referred were those of property and liberty, since workers and consumers were not in the habit of asking courts of equity for labor injunctions.

For a brief period in the 1940's the Court progressed beyond the *Gompers* view of labor expression. In a series of cases beginning with *Thornhill v. Alabama*,[176] and culminating in *International Brotherhood of Teamsters, Local 695 v. Vogt, Inc.*,[177] the Court first granted and then effectively withdrew protection for labor picketing associated with boycott activities. As in the government employee cases, protection was justified on the ground that labor expression was of public, "not mere local or private," concern.[178] However, the subsequent limitation and eventual withdrawal of protection was accomplished without reference to the public or private character of labor expression. Instead, the Court employed the speech-conduct distinction and the unlawful objective test. The empty and conclusory character of those doctrines has been exposed and critiqued elsewhere.[179] For the purposes of this Article, however, it is necessary to review the cases briefly in order to explore the underlying logic of the Court's current approach.

At first, the Court subjected picketing restrictions to meaningful scrutiny. Picketing was protected, but could be prohibited when undertaken for an "unlawful objective."[180] Soon, however, the withdrawal of protection outstripped the logic, if not the rhetoric, of this rationale. Picketing could be prohibited even where the picketers demanded no illegal action either from the target business or from the workers or consumers being urged to support the boycott.[181] An unlawful objective was no longer required; it was enough that the state have a "policy" against *picketing* for the particular objective. This circular approach permitted states to justify injunctions simply by setting forth a judicial or legislative policy against the picketing.[182]

176. 310 U.S. 88 (1940).

177. 354 U.S. 284 (1957).

178. Thornhill v. Alabama, 310 U.S. at 103-04. *See also* Hague v. CIO, 307 U.S. 496, 512 (1939).

179. *See* L. TRIBE, CONSTITUTIONAL CHOICES, *supra* note 19, at 198-203; Note, *supra* note 2, at 940-47; Note, *Peaceful Labor Picketing and the First Amendment*, 82 COLUM. L. REV. 1469, 1475-95 (1982); Note, *supra* note 161, at 663-71.

180. *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) (upholding injunction against picketing where union's objective was to pressure employer into unlawful agreement to refrain from selling ice to nonunion dealers).

181. *See, e.g.*, International Bhd. of Teamsters, Local 309 v. Hanke, 339 U.S. 470 (1950) (upholding injunction against picketing that sought to pressure self-employed individuals to join the union even though they had a legal right to do so); Hughes v. Superior Court, 339 U.S. 460 (1950) (upholding injunction against picketing aimed at pressuring employer to hire more blacks). In these cases, the state had not outlawed the objective of the picketers, but the Court concluded that the illegal objective test was met because a state policy had been violated. *See Hanke*, 339 U.S. at 478-79; *Hughes*, 339 U.S. at 466-68.

182. *See* Tobriner, *The Organizational Picket Line: Lawful Economic Pressure*, 3 STAN. L REV. 423, 437-39 (1951); *see also* Note, *supra* note 2, at 942-43.

To back up the unlawful objective test, the Court resurrected the *Gompers* distinction between speech and action. This distinction has one meaning outside the labor relations context and another altogether in the black hole itself. Outside the labor context, the doctrine centers literally on the physical distinction between speech and conduct. For example, picketing and parading include components of conduct such as patrolling that may be regulated. The classification of these activities as conduct has nothing to do either with the identity of the speaker or the subject matter of the message. Accordingly, the speech-conduct distinction in this form can justify only restrictions that are, at least facially, content-neutral. Outside the labor context, the doctrine has been confined to that function.[183]

In the labor context, on the other hand, the Court routinely employs the speech-conduct distinction to justify relaxed scrutiny of restrictions directed at the content of expression. During the 1950's, the Court repeatedly rejected challenges to restrictions that affected only picketing that advocated a boycott. In a series of opinions for the Court, Justice Frankfurter developed the technique of stating that picketing constituted more than speech, and then switching the focus to the difficult "social-economic" issues considered by the state in passing the legislation.[184] He did not attempt to explain why the element of conduct in labor picketing should justify reduced scrutiny of restrictions

183. *See* L. TRIBE, *supra* note 2, at 601 (contending that the speech-conduct distinction is relatively harmless because it generally serves as a shorthand approach for distinguishing between restrictions based on the communicative impact of speech, which are subject to strict scrutiny, and restrictions based on an interest unrelated to communicative impact); *see also* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975). Cases consistent with this approach include United States v. O'Brien, 391 U.S. 367, 377 (1968) (burning draft card was "mixed speech and conduct" which could be prohibited provided that the restriction furthered a governmental interest "unrelated to the suppression of free expression"); Adderley v. Florida, 385 U.S. 39 (1966) (demonstration on jailhouse grounds was unprotected conduct); Cox v. Louisiana, 379 U.S. 559 (1965) (demonstration of 2,000 students outside courthouse constituted "speech plus" that could be prohibited or regulated under "time-place" restrictions).

184. *Hanke*, 339 U.S. at 474-75; *Hughes*, 339 U.S. at 464-65; *see also* Building Service Employers Int'l Union v. Gazzam, 339 U.S. 532, 536-37 (1950). Justice Frankfurter summed up this trend in International Bhd. of Teamsters, Local 695 v. Vogt, Inc., 354 U.S. 284, 290 (1957): "[T]he strong reliance on the particular facts in each case demonstrated a growing awareness that these cases involved not so much questions of free speech as review of the balance struck by a State between picketing that involved more than 'publicity' and competing interests of state policy." In these cases, the state did not contend that the restrictive legislation was directed at the noncommunicative aspects of picketing; on the contrary, the state argued the prohibitions were necessary to stop the boycotts from successsfully achieving their objectives. *See generally* Note, *supra* note 161, at 664-67.

directed not at the conduct, but at the communicative impact of the picketers' message.

The most recent—and revealing—of the labor picketing decisions is *NLRB v. Retail Store Employees Union, Local 1001, (Safeco)*.[185] In *Safeco*, a union was enjoined from peacefully picketing a company that derived most of its income from the sale of insurance policies issued by a struck employer. The pickets had urged customers of the neutral company to cancel policies issued by the struck employer. The Court sustained the injunction, rejecting the union's First Amendment claim.

The plurality and concurring opinions advanced three rationales for the result.[186] Justice Powell, writing for the plurality, asserted that the injunction did not offend the First Amendment because of the picketers' unlawful objective.[187] However, as Archibald Cox has observed, the union's objective was unlawful only in the "Pickwickean sense," since neither the consumers nor the business owner were asked to do anything illegal.[188]

The remaining two rationales corresponded to the two forms of coercion condemned in *Gompers*. The plurality was concerned about the impact of the picketing on the picketed business.[189] However, under current First Amendment doctrine, the coercive impact on the picketed business is not relevant in making the initial determination as to the protected or nonprotected status of the expression. Instead, that factor is properly considered in ascertaining whether the governmental interest in restricting the expression is sufficiently compelling to justify content discrimination.[190]

Finally, Justice Stevens echoed the *Gompers* Court's fear that union boycott advocacy coerces workers and consumers. Also in the tradition of *Gompers*, he couched this fear in terms of the speech-conduct distinction. In *Safeco*, there was no indication that the picketing had been physically coercive, or even that the pickets had persuaded

185. 447 U.S. 607 (1980).

186. On the First Amendment issue, the Chief Justice and Justices Stewart and Rehnquist joined Justice Powell's opinion for the Court. Justices Blackmun and Stevens concurred separately. Justice Brennan, joined by Justices White and Marshall, dissented on grounds unrelated to the First Amendment issue.

187. *Safeco*, 447 U.S. at 616.

188. Cox, *Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 36 (1980). *See also* Note, *supra* note 2, at 946.

189. *Safeco*, 447 U.S. at 616 ("[secondary] picketing spreads labor discord by coercing a neutral party to join the fray").

190. *See* Note, *supra* note 2, at 945, n.40. In effect, Justice Blackmun adopted this view in his *Safeco* concurrence. 447 U.S. at 616-18 (content-based restriction on labor picketing is justified only because it serves a substantial governmental interest).

anyone to join the boycott. Nevertheless, Justice Stevens experienced "little difficulty" upholding the injunction because "[i]n the labor context, it is the conduct element rather than the particular idea being expressed" that is most persuasive.[191] Why? Because union picketing "calls for an automatic response to a signal rather than a reasoned response to an idea."[192]

Justice Stevens' vision of union picketing has since been adopted by a unanimous Court.[193] Inasmuch as this approach conveys more than a judicial preference for scholarly discourse, it seems to suggest that labor picketing coerces by triggering an involuntary and unreasoned reaction.[194] Labor unions, however, have no monopoly on emotive communication. Thus, under Justice Stevens' rationale, political expression,[195] advertising, and most messages designed to provoke action could be shorn of protection.[196]

The three-systems ladder provides a more logical, if not more defensible, explanation of the *Safeco* decision. The employee-picketers were attempting to influence their employer without proceeding through external democratic channels. Their expressive activities remained within the system of labor relations. Hence, the question of whether or not to protect such expression could safely be left to Congress' "delicate balance" of free speech and economic interests.[197]

The rise of constitutional protection for boycott activities carried on by civil rights organizations has removed any pretense that the speech-conduct distinction can explain or rationalize the near-total withdrawal of protection from labor picketing. In a series of cases, the Court protected sit-ins on private property conducted to protest the racial policies of private businesses. The sit-ins were, by any measure, at least as coercive as picketing. In *Garner v. Louisiana*,[198] for example, black demonstrators sat in at three "whites only" lunch counters, occupying seats normally reserved for paying customers. The target businesses were thus directly coerced by the loss of business. Moreover, the sit-ins did not involve an attempt peacefully to persuade consumers to join a boycott; the physical presence of the demonstrators prevented would-be customers from patronizing the targets. Although the Court

191. 447 U.S. at 619 (Stevens, J., concurring).
192. *Id.*
193. *See ILA*, 456 U.S. at 226 n.26.
194. *See* L. TRIBE, CONSTITUTIONAL CHOICES, *supra* note 19.
195. *See* COX, *supra* note 188, at 47.
196. *See* L. TRIBE, CONSTITUTIONAL CHOICES, *supra* note 19.
197. *Safeco*, 447 U.S. at 617 (Blackmun, J., concurring).
198. 368 U.S. 157 (1961).

managed to provide protection for the demonstrators without reaching the First Amendment issue,[199] Justice Harlan addressed that issue in his concurring opinion. Overlooking the labor cases, he dispensed with the speech-conduct distinction by asserting that the sit-ins were "as much a part of the 'free trade in ideas' . . . as is verbal expression,"[200] and that they appealed to "the power of reason as applied through public discussion."[201] Hence, Justice Harlan concluded, the sit-ins were entitled to full First Amendment protection.[202] As Harry Kalven promptly recognized, the Court's preference for civil rights sit-ins over labor picketing could be explained only in terms of a special commitment to the civil rights movement.[203]

The key doctrinal breakthrough for rejuvenated constitutional protection of boycott activity came not in a boycott case, but in a case involving the Sherman Act's prohibition against conspiracies in restraint of trade. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight*,[204] an association of railroads put out a barrage of anti-trucking propaganda, utilizing techniques generally prohibited under the Sherman Act. This effort was aimed at securing the passage of legislation restricting the trucking industry, the railroads' major competition. The Court found no antitrust violation, noting that to construe the act to prohibit "political activity" such as this would "raise important constitutional questions."[205] As in the government employees cases, exemption from economic regulation was linked to the political character of the expressive activities. In *Noerr*, the process-oriented character of the distinction between political and business activities was made explicit. Neither content nor motivation figured in the Court's analysis. Instead, the result turned on the fact that the railroads were exercising their right to petition the legislature.[206] *Noerr* was subsequently extended to protect access to administrative agencies,[207] and

199. In connection with the sit-ins, the individuals had been convicted of disturbing the peace. The Court reversed, holding that the evidence was insufficient to support the convictions. *Id.* at 173-74.

200. *Id.* at 201 (Harlan, J., concurring) (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

201. 368 U.S. at 201 (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

202. 368 U.S. at 207.

203. *See* H. KALVEN, *supra* note 16, at 123-72.

204. 365 U.S. 127 (1961).

205. *Id.* at 137-38.

206. *See id.* at 136-40.

207. United Mine Workers v. Pennington, 381 U.S. 657 (1965).

courts.[208]

In *NAACP v. Claiborne Hardware*,[209] the Court explicitly revived First Amendment protection for boycott activities. There, the NAACP organized a boycott of white-owned businesses in Port Gibson, Mississippi. The boycotters made demands on both the local government and local businesses.[210] Seventeen merchants filed suit, alleging violations of Mississippi's tort law, antitrust legislation, and secondary boycott statute.[211] The concerns underlying the "speech-plus" doctrine in the labor cases were present in full force. There was violence intermingled with peaceful boycott activities.[212] Pickets employed symbols such as black hats to discourage shoppers from entering white-owned stores. Boycott violators were ostracized as "traitors" in the black community.[213] Neutral businesses suffered extensive financial loss.[214] Nevertheless, the Court held that the peaceful boycott activities merited protection, commenting that "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."[215]

Applying the three-systems approach, the holding in *Claiborne* may be explained by either of two theories. As noted above, the NAACP made demands both on government and on private businesses.[216] To the extent that the boycotters were pressuring business owners to influence elected officials, the boycott picketing fell within the process definition of political expression.[217] Alternatively, *Claiborne* could be explained as an application of the racial exception to the

208. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972) (dictum).

209. 458 U.S. 886 (1982).

210. Among the demands addressed to local government were demands for the employment of blacks by the county government, desegregation of county facilities, and improvements in black neighborhoods. Among those directed at private businesses were demands that all stores hire black clerks and cashiers and that all businesses in the county comply with the Civil Rights Act of 1964. NAACP v. Claiborne Hardware, 393 So. 2d 1290, 1296-97 (Miss. 1980), *rev'd*, 458 U.S. 886 (1982). The full list of demands was presented to public officials, and a subset was presented to the Chamber of Commerce.

211. 458 U.S. at 889-93.

212. In at least four incidents, including two involving shots fired into the homes of nonboycotters, a direct connection between the boycott and violence was established. *Id.* at 904.

213. *Id.*

214. The lower court had awarded the merchants $944,699 in damages resulting from lost business earnings and lost good will. *Id.* at 893.

215. *Id.* at 910.

216. *See supra* note 210 and accompanying text.

217. *Cf.* Missouri v. NOW, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980) (boycott of privately-owned convention facilities with aim of pressuring legislature held to constitute political activity not prohibitable under Sherman Act).

three-systems ladder.[218]

Just three months prior to deciding *Claiborne*, the Court rejected a similar First Amendment claim advanced by a union. In *International Longshoremen's Association v. Allied International* (*ILA*),[219] a longshoremen's union protested the Soviet invasion of Afghanistan by refusing to service ships carrying goods to or from the Soviet Union. The Court held that this activity violated the secondary boycott provisions of the National Labor Relations Act[220] and rejected the union's constitutional argument in a terse one-paragraph statement:

> Application of § 8(b)(4) to the ILA's activity in this case will not infringe upon the First Amendment rights of the ILA and its members. We have consistently rejected the claim that secondary picketing by labor unions in violation of § 8(b)(4) is protected activity under the First Amendment. It would seem even clearer that conduct designed not to communicate but to coerce merits still less consideration under the First Amendment. The labor laws reflect a careful balancing of interests. There are many ways in which a union and its individual members may express their opposition to Russian foreign policy without infringing upon the rights of others.[221]

This discussion is representative of the Court's treatment of labor boycotts and picketing. Coercion was mentioned but it is unclear who was being coerced or how. Having thus dismissed the union's expression as worthless, the Court concluded its cursory analysis by intoning its deference to Congress on labor matters.

The Court's treatment of the distinction between political and labor expression reflects the strange nature of the labor black hole. In its brief to the Supreme Court, the union argued vigorously that the boycott activities were entitled to protection as political expression.[222] Indeed, the picketing was clearly political in both content and motivation. The Court accepted this characterization in its discussion of the boycott's legality under the labor law.[223] There, however, the political character of the boycott activities made them " 'more rather than less objectionable [because the union had departed from] what has traditionally been thought to be the realm of legitimate union activity.' "[224]

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218. *See infra* note 270 and accompanying text.

219. 456 U.S. 212 (1982).

220. National Labor Relations Act § 8(b)(4), 29 U.S.C. § 158(b)(4) (1935), *amended by* 29 U.S.C. § 158(b)(4) (1959).

221. 456 U.S. at 226-27 (footnotes and citations omitted).

222. Petitioner's Brief at 34, 37, *ILA*, 456 U.S. 212 (1982).

223. *ILA*, 456 U.S. at 225-26.

224. *Id.* at 225-26 (quoting Allied Int'l, Inc. v. Local 799, International Longshoremen's Ass'n, 640 F.2d 1368, 1378 (1st Cir. 1981)).

In the constitutional portion of the opinion, where the picketing's political nature would have been an asset, the Court simply ignored it.[225]

The expressive activities in *ILA* fell into a nether zone between political and labor speech and were drawn into the black hole. Under the process definition, the picketing was not entitled to the protection accorded political speech because it was directed not at the constitutionally established institutions of government, but at a foreign power.[226] Hence, the picketing lacked sufficient constitutional value to elude treatment as labor speech.

The contrast between the unanimous opinion in *ILA* and the 7-1-0 decision in *Claiborne*[227] illustrates the operation of the three-systems approach in the boycott area. Justice Stevens, writing for the Court in *Claiborne*, distinguished *ILA* and other labor cases by contrasting the economic restrictions involved in those cases with the political activity involved in *Claiborne*.[228] The Court conveniently ignored the facts that *Claiborne* also involved economic restrictions and that *ILA* also involved political activity.[229] Justice Stevens, whose opinion in *Safeco*

225. *ILA*, 456 U.S. at 266.

226. *Cf.* Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 107-08 (C.D. Cal. 1971), *aff'd on other grounds*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972) (declining to extend *Noerr* [discussed *supra* text accompanying notes 204-06] to immunize from Sherman Act prosecution the petitioning of foreign governments); *see also* Coastal States Mktg., Inc. v. Hunt, 694 F.2d 1358, 1364-67 (5th Cir. 1983) (extending *Noerr* to protect the petitioning of foreign governments, but only on statutory grounds).

227. Justice Marshall disqualified himself, and Justice Rehnquist concurred in the judgment without opinion.

228. The labor cases were portrayed as instances of judicial deference to " 'Congress' striking of the delicate balance' " between union free speech and employers' rights, *Claiborne*, 458 U.S. at 912 (quoting *Safeco*, 447 U.S. at 617-18 (Blackmun, J., concurring)) or to the states' "broad power to regulate economic activity," 458 U.S. at 913. Having justified the labor decisions solely with reference to the character of the restrictions, Justice Stevens then shifted the focus back to the expression, stating that there was no "comparable right to restrict peaceful political activity such as that [in *Claiborne*]." *Id.*

229. *See supra* text accompanying note 225. There is an arguably significant factual difference between the two cases—that between the consumer boycott in *Claiborne* and the work stoppage in *ILA*. Commentators have advanced several arguments in support of the notion that this is a meaningful distinction. First, it has been suggested that unions may have the power to discipline their members for refusing to support a work stoppage. *See* Note, *supra* note 2, at 938, n.2. However, under current law, unions are prohibited from spending an individual member's dues for political purposes over the member's objection, much less from compelling a member to participate in a political boycott. *See* cases cited *supra* note 12. Further, the extent of a union's power to discipline members depends upon the facts of the particular case. Many union locals are far too weak to employ anything approaching the formidable sanctions utilized by the NAACP in *Claiborne*. *See supra* text accompanying notes 212-14. A blanket assumption that unions possess the power to coerce

had introduced the term "signal" to the Court's modern lexicon,[230] never mentioned that term in *Claiborne*. Instead, he dredged up an old labor case from the *Thornhill* era, long since crushed in the black hole, and proclaimed that " '[t]he First Amendment is a charter for government, not an institution for learning. "Free trade in ideas" means free trade in the opportunity to persuade to action, not merely to describe facts.' "[231] In stark contrast to the one paragraph write-off of the First Amendment claim in *ILA*, Justice Stevens undertook a sensitive and in-depth analysis of the political-economic situation in Claiborne County, noting that the economic and political power structures were merged,[232] and that the NAACP was fighting a system that had denied blacks racial justice.[233]

Stepping back from the particular cases, it is apparent that the overall pattern of results conforms to the structure of the three-systems ladder. Boycotts and other expressive activities normally prohibited under economic regulations gain First Amendment protection when directed at the external processes of government. This protection is accorded whether the purpose and content of the "speaker's" demands are political[234] or economic.[235] On the other hand, such activities go

members into work stoppages could only arise from an unreasoned fear of unions and workers.

Second, it has been pointed out that work stoppages may involve breaches of contract. *See* Note, *supra* note 2, at 938, n.2. However, the employer in *ILA* brought suit to enforce the federal labor law, not to vindicate contractual rights. Moreover, there is no apparent reason why a breach of contract should remove protection from expression where a violation of otherwise applicable economic legislation would not. *See, e.g., Noerr*, 365 U.S. 127 (discussed *supra* text accompanying notes 204-06).

Finally, it is argued that producer boycotts, unlike consumer boycotts, are inherently undemocratic. *See* Harper, *The Consumer's Emerging Right to Boycott:* NAACP v. Claiborne Hardware *and Its Implications for American Labor Law*, 93 YALE L.J. 409, 427 (1984). This argument requires a more extensive discussion. *See infra* text accompanying notes 315-19.

230. *See supra* text accompanying note 192. The term "signal" had also been employed by the *Gompers* court. *See supra* text accompanying note 174.

231. *Claiborne*, 458 U.S. at 910 (quoting Thomas v. Collins, 323 U.S. 516, 537 (1945)).

232. *See Claiborne*, 458 U.S. at 889 n.3.

233. *Id.* at 918.

234. *See generally Claiborne*, 458 U.S. 886 (1982) (discussed *supra* text accompanying notes 209-15); *but see* American Communications Ass'n v. Douds, 339 U.S. 382, 391-92 (1950) (discussed *supra* note 15 and accompanying text).

235. *See Noerr*, 365 U.S. 127 (1961) (discussed *supra* text accompanying notes 204-06); *see also* United Mine Workers v. Pennington, 381 U.S. 657 (1965) (combination of union and corporations with the aim of setting anti-competitive wage scale, held not to be prohibited under Sherman Act because directed at influencing government officials); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-511 (1972) (Sherman Act does not prohibit corporation from filing suit even though its purpose was anticompetitive) (dictum).

without protection when not directed at external channels, again without regard to their political [236] or economic [237] purpose or content. However, where such activities raise racial grievances, they are protected even when not directed at external channels.[238]

The process analysis applied here to cases involving government workers and private sector boycotts could be extended throughout the First Amendment area. In distinguishing political from commercial advocacy, for example, the analysis would focus on whether the communication was directed at influencing listeners in their roles as participants in the exterior processes of government, or in their roles as participants in the economic marketplace.[239] And, in distinguishing protected political spending from unprotected bribes, the inquiry would focus on whether, at some point, the transaction proceeded openly through the exterior processes of government.[240] For a final example, protected political association would be distinguished from unprotected economic association on the basis of whether or not the associative activities were directed at external democratic channels.[241] In short, the government employee and boycott cases are only illustrative of the trend all along the system boundaries.

III. The Three-Systems Ladder and Constitutional Vision

The rise of constitutional protection for rights of free expression

236. *See ILA*, 456 U.S. 212 (1982) (discussed *supra* text accompanying notes 219-31).

237. *See Safeco*, 447 U.S. 607 (1980) (discussed *supra* text accompanying notes 185-96); *see also* International Bhd. of Teamsters, Local 693 v. Vogt, Inc., 354 U.S. 284 (1957), and the other labor picketing cases discussed *supra* notes 180-82, 184 and accompanying text.

238. *See, e.g.*, Garner v. Louisiana, 368 U.S. 157 (1961) (discussed *supra* text accompanying notes 198-202); *cf.* Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (overturning injunction against residential picketing of real estate broker in protest of racial sales practices); *but see Hughes*, 339 U.S. 460 (1950) (upholding injunction against picketing of store by black citizens group demanding that blacks be hired in proportion to their population in the area). Note that *Hughes* was decided prior to the rise of the racial exception, which coincided with the wave of civil rights protests in the late 1950's and early 1960's.

239. *See, e.g.*, Bolger v. Youngs Drug Products Corp., 103 S. Ct. 2875, 2881 (1983) (finding it unnecessary to protect comments on public issues made in the context of commercial transactions because such comments may be made outside that context with full protection); *Central Hudson*, 447 U.S. 557, 562-63, n.5 (1980) (same).

240. In Brown v. Hartlage, 456 U.S. 45 (1982), for example, the Court held that a candidate's promise to cut the pay of his office if elected was protected political expression even though he was proposing to provide taxpayers with a pecuniary benefit in exchange for votes. The Court acknowledged that even those commercial solicitations that affect the political arena are normally prohibitable. *Id.* at 56. Nonetheless, "[s]o long as the hoped-for personal benefit is to be achieved *through the normal processes of government*, and not through some private arrangement, it has always been, and remains, a reputable basis on which to cast one's ballot." *Id.* (emphasis added).

241. *See supra* note 30.

coincided with the decline of protection for economic rights.[242] The three-systems ladder can be understood only with reference to this decisive reversal of judicial values. The shift was initially advocated and later rationalized on the basis of two general theories of "preferred rights," one grounded in values of self-government and the other in such nebulous values as "self-fulfillment."[243] This Article examines the three-systems ladder solely in relation to the values of self-government. There are three reasons for this relatively narrow focus. First, the doctrinal content of the ladder has been shaped and justified primarily with reference to those values.[244] Second, the "preferred rights" theory based on values of self-government has gained virtual hegemony among both commentators and Justices.[245] Finally, though the clash between process and substance, self-government and self-fulfillment, and instrumental and noninstrumental conceptions of the First Amendment will not be resolved here, it should be noted that theories built on the latter half of each of these dichotomies are fundamentally incapable of rationalizing the simultaneous protection of "personal" rights and nonprotection of "economic" rights.[246] Hence, as long as the Court continues to subject economic and social legislation to minimal

242. On the rise of First Amendment protection, see Kairys, *Freedom of Speech*, in THE POLITICS OF LAW 140 (D. Kairys ed. 1982). On the decline of economic due process, see McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34.

243. *See* McCloskey, *supra* note 242, at 45-50.

244. *See supra* part II of this Article.

245. *See supra* text accompanying notes 28-36. The self-government value is supported by powerful textual, structural, and "neutrality" arguments. *See* BeVier, *supra* note 26. Dean Ely has situated these arguments in a general theory of constitutional law. *See* J. ELY, *supra* note 18.

246. Not only does the self-fulfillment theory have "the smell of the lamp" about it, McCloskey, *supra* note 242, at 46, it is simply too subjective and indeterminate to provide the basis for a theory of constitutional review that is sensitive to the difficulty of legitimating choices made by an unelected branch of government. At a gut level, the problem with this indeterminacy may be summed up in the question: "Who are judges to tell me or anybody else that talking is more fulfilling than producing useful products?" At the level of liberal theory, the problem is that the self-fulfillment value involves not only constitutional protection of liberty, but also judicial determination of "the good." *See* Bork, *supra* note 26, at 25. The distinction between liberty and "the good" traces back to the theory of the social contract. According to this theory, a rational individual—whether in a state of nature or an imaginary "original position"—would rationally choose to accept the existence of a coercive state only if guaranteed the liberty to seek happiness according to his own definition of "the good." *See generally* J. RAWLS, A THEORY OF JUSTICE (1971); *see also* J. LOCKE, TWO TREATISES OF GOVERNMENT (1698). Though it may be true that any conception of liberty or process necessarily embodies a conception of "the good," *see* Tribe, *The Puzzling Persistance of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980), such a conception must—at least under the legal system in its present form—be mediated by a more determinate and structured set of legal ideals to preserve the appearance of the rule of law and

scrutiny, theories based on values of self-government will be of more use to litigators in attempting to defend and expand First Amendment rights.[247]

The vision of the First Amendment as guarantor of the processes of representative government is grounded in the famous *Carolene Products* footnote [248] and fleshed out with the ideal of pluralism.[249] According to the pluralist vision, society is divided into a large number of competing interest groups. In the well functioning polity, no single group gains dominance; all groups are able to press their concerns and make alliances, thereby ensuring that their interests will receive fair consideration. Politics consists of the coalescence of temporary majorities because society, and even individuals themselves, are fractured into many competing interests. As long as the process is fair, everyone must abide by the results, win or lose.[250] The Court, an antimajoritarian institution, is limited to two functions: protecting the representative process from attempts by temporary majorities to consolidate their power and shut out other groups, and rectifying outcomes that result from the presence of "discrete and insular" minorities who, because of "prejudice" or structural disadvantages, are unable to participate effectively in coalition building.[251]

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sustain the legitimacy of judicial review. *But see* Baker, *supra* note 37 (since commercial speech is compelled by market dynamics, it is not an expression of liberty).

247. This is not to suggest that criticism of the economic-political distinction is not a valid part of the debate over values. But what is useful in prescriptive debate is not necessarily useful in descriptive analysis; to insist that values such as "self-fulfillment" can help to explain the current practice of the Court is to obscure the contradictions and tensions in the underlying doctrinal structure.

248. "It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we enquire whether . . . prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry . . . ." United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (citations omitted).

249. For authoritative support, commentators look to James Madison's contributions to *The Federalist*, particularly nn. 10 & 51. For comprehensive pluralist theories of constitutional law, see J. ELY, *supra* note 18, and J. CHOPER, *supra* note 18.

250. For classic and comprehensive statements of the pluralist theory, see R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); D. TRUMAN, THE GOVERNMENTAL PROCESS (1951). *See also* Regents of the University of California v. Bakke, 438 U.S. 265, 299 (1978) (opinion of Powell, J.) ("[P]olitical judgments are the product of rough compromise struck by contending groups within the democratic process.") (citing R. DAHL, *supra*).

251. There is a lively debate over what type of disadvantage is of constitutional dimension. *Compare* J. ELY, *supra* note 18, at 152-53 ("discrete and insular" minorities are unable to participate effectively because other groups are prejudiced against them and therefore

For the purposes of this Article, the *Carolene Products* vision raises two major unsettled issues. First, what is the remedy for the plight of "discrete and insular" minorities? The prevailing view relies solely upon the application of strict equal protection scrutiny to governmental action that disadvantages those groups.[252] Indeed, special protection of disadvantaged groups in the process itself would violate the supreme process principle of strict governmental neutrality among opposing speakers and viewpoints.[253] Section A assesses the three-systems ladder in light of this "formal-neutral" view of the First Amendment.

Though the Court's duty of impartiality is a matter of canon, it has long been recognized that civil rights protests received special protection at the height of the southern civil rights movement.[254] Professor Robert Cover[255] has described the history of Supreme Court intervention in the civil rights struggle in terms of a conscious shift from outcome scrutiny, exemplified by *Brown v. Board of Education*,[256] to First Amendment protection for militant civil rights tactics, exemplified by sit-in cases such as *Garner v. Louisiana*.[257] This approach will be called the "group-sensitive" vision of the First Amendment. Instead of rectifying the outcomes that result from flaws in the process, the Court provides the disadvantaged group with the tools needed to correct both the process and the outcomes. Section B examines the three-systems ladder from this perspective.

The second unresolved question asks how far the processes of representation extend. If only the formal processes of representative government are included,[258] then the Supreme Court has gone too far in

shun them in the bargaining process) *with* C. MACKINNON, *supra* note 25, at 116-18 (groups that are effectively subjugated—culturally, economically, and politically—need aggressive judicial intervention on their behalves).

252. *See, e.g.*, J. ELY, *supra* note 18, at 135-79.

253. For well-supported discussions of this principle, see Karst, *supra* note 19, at 29-35; Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 215-18 (1982); J. ELY, *supra* note 18, at 105-34. Commentators and justices are nearly unanimous on this general point. They disagree, however, whether this principle extends to subject-matter restrictions or to facially neutral restrictions that impose unequal burdens on different viewpoints. *See, e.g.*, Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978) (contending that subject-matter restrictions are less suspect than viewpoint restrictions).

254. Harry Kalven portrayed the series of civil rights protest cases as a war between the NAACP and the "South," with the Supreme Court actively enlisted on the side of the NAACP. *See* H. KALVEN, *supra* note 16.

255. *See* Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1311-13 (1982).

256. 347 U.S. 483 (1954).

257. 368 U.S. 157 (1961) (discussed *supra* text accompanying notes 198-202).

258. For the narrowest view on this issue, see *supra* note 57.

protecting commercial speech and in guaranteeing some rights to employ economic power in the political system. However, if the institutions of representative government are inextricably connected to all power relations in society, then the rigid boundaries among the systems are unjustifiable because labor relations and even commercial competition may be regarded as struggles for power.[259] Section C suggests that by granting constitutional protection to some rights of economic expression, the Court has stepped onto a slippery slope toward constitutional protection for general rights of economic participation.

A. The Three-Systems Ladder Viewed from the Formal-Neutral Perspective

Most *Carolene Products* enthusiasts take a narrow view of the political process protected by the First Amendment, limiting it to the formal institutions of representative government.[260] This view is consistent with the process definition of political speech, which centers on the flow of speech through the formal processes of government.[261] It also comports with the nonprotection of labor speech.

Adherents of the *Carolene Products* vision, however, are split over the issue of protection for commercial speech. Most oppose protection on the ground that commercial speech, measured against the values embodied in the *Carolene Products* footnote, is "remarkable for its insignificance."[262] John Hart Ely, however, urges protection for all speech, with narrow exceptions, as a safety zone around core *Carolene Products* speech.[263]

The three-systems ladder clashes with formal-neutral precepts in two important respects. First, the Court's preference for commercial speech over labor speech violates the principle of neutrality. If protection for commercial speech is justifiable at all, it is only as part of a protective zone around political expression. There is no apparent reason why that protective zone should not extend to labor as well as com-

259. For a powerful argument in support of this proposition, see M. WALZER, SPHERES OF JUSTICE 300-03 (1983) (large-scale business enterprises are de facto political units and should be structured according to constitutional principles of democracy). *See also* C. LINDBLOM, POLITICS AND MARKETS 171 (1977) (delegation of decisions on production and allocation of resources to businessmen does not diminish the public aspect of those decisions).

260. *See, e.g.*, the works cited *supra* note 18.

261. *See supra* text accompanying note 73.

262. Jackson & Jeffries, *supra* note 2, at 14. *See also* BeVier, *supra* note 26, at 352-55.

263. J. ELY, *supra* note 18, at 233 n.27. The disagreement between Ely and scholars such as BeVier is not over First Amendment values, but over the extent to which the judiciary may be trusted to make value judgments concerning the worth of speech.

mercial speech.[264] Differential treatment could be justified only with reference to values of economic efficiency, which, in the *Carolene* paradigm, are the concern of the legislature—not the Court.[265] This problem, however, has not provoked much criticism from formal-neutral theorists, perhaps because labor expression has no affirmative value in the *Carolene Products* vision.[266]

Second, in selectively protecting some applications of economic power to the political process, the Court has exceeded the bounds of formality. In the formal-neutral view, economic and political power should be distinguished analytically, and protection accorded only to exercises of the latter.[267] The Court's protection of political expenditures and contributions, as well as certain boycott activities, violates this separation. Moreover, the differential treatment of business enterprises, civil rights organizations, and labor unions in the exercise of economic power infringes upon the neutrality of the formal political process. Unlike the Court's preference for commercial over labor expression, these disparities threaten the core values of the formal-neutral approach.

B. The Three-Systems Ladder Viewed from the Group-Sensitive Perspective

In the *Carolene Products* vision, those groups that are unable to ensure that their interests will be fairly considered in the political process require special judicial protection. In the First Amendment area,

264. *Id.* at 111-16 (contending that all restrictions aimed at the communicative impact of protected speech must be subjected to strict scrutiny).

265. *See* Note, *supra* note 2, at 959-60 (protection of commercial speech and nonprotection of labor picketing indicates the adoption of *Lochner*-type free enterprise values by the Court). For judicial expression of economic values, see Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898 (1971) (Brennan, J., dissenting from denial of certiorari): "[Commercial speech] could not be regarded as less important than political expression. When immersed in a free flow of commercial information, private sector decisionmaking is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general allocation of resources." *Id.* at 905 (citing economic texts). It has also been suggested that protection for commercial speech could be justified with reference to consumers' rights to know. *See* Note, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720, 745-46 (1982). This argument, however, would also justify protection for labor speech, since presumably consumers have a right to know whether a product is being produced by underpaid workers or strikebreakers.

266. On the few occasions those theorists have addressed the problem, it has usually been to note the lack of value of labor speech. *See, e.g.*, Stephan, *supra* note 253, at 204.

267. John Rawls, a formal-neutral thinker par excellence, urges the total exclusion of economic power from the political process in order to prevent inequalities, which are desirable in the market, from intruding into the political sphere where absolute equality is the rule. *See* J. RAWLS, *supra* note 246, at 225-28.

this means special protection for the associational and expressive activities of those groups.[268] The special treatment afforded civil rights protests is the prime example; as noted above, that treatment amounts to a cross-systemic exception granting political speech status to all race-related grievances.[269] Not only is the community of black Americans the quintessential example of a group that has been structurally excluded from effective political participation, but special treatment of black protests can be justified with reference to the Civil War Amendments.[270] Were the formal-neutral theorists forced to confront the racial exception, they might well accept it but draw the line there.[271] However, because of the vital role of group representation in the pluralist model, there is constant pressure to consider the identity and needs of particular groups.[272] Hence, it is not surprising that group-sensitive concerns pervade the structuring of the three systems themselves.

On the transcendent-immanent spectrum, the commercial system is on the immanent side of the political system and on the transcendent side of the labor relations system.[273] The Court has explained the relationship between the commercial and political systems with reference to the "hardiness" of commercial speech, which is the "sine qua non of commercial profits."[274] Indeed, commercial speech is hardy not only in the immediate sense that there is less danger of chilling it, but also in the political sense. Business interests have both the incentive and the

268. *See* Cover, *supra* note 255, at 1311-12. *See generally* H. KALVEN, *supra* note 16.

269. *See supra* text accompanying notes 156-57, 198-203, 209-15, 238.

270. *See, e.g., Claiborne*, 458 U.S. 886, 914 (1982) ("The right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically-motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself."). Neither the subjugated position of blacks nor the effectiveness and indispensibility of the forms of organization and protest protected by the Court need be recounted here.

271. Arguing by analogy to blacks, it could be suggested that civil rights protests by women should also be accorded cross-systemic protection. *See* Missouri v. NOW, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980) (secondary boycott by NOW to encourage Illinois legislature to ratify the ERA held protected against suit under Sherman Act and state tort law) (cited by the Supreme Court in *Claiborne*, 458 U.S. at 914 n.48). Any serious attempt to address that issue, however, would require an assessment of the possiblility that the area of sexual relations constitutes a fourth system of power, a project which is beyond the scope of this Article.

272. In Professor Parker's terminology, this pressure sets up a tension between two essential attributes of judicial review: sensitivity and detachment. *See* Parker, Political Vision in Constitutional Argument, *supra* note 65, at 21-22.

273. *See supra* text accompanying notes 65-72.

274. *Virginia State Bd. of Pharmacy*, 425 U.S. at 771-72 n.24. *See also Central Hudson*, 447 U.S. at 564 n.6.

wherewithal to insure that their opposition to restrictions on commercial speech will be forcefully asserted in the political process.[275] Hence, the judgment that commercial speech requires less protection than political speech is consistent with the *Carolene Products* view.

The placement of the commercial system to the transcendent side of the labor system, however, is difficult if not impossible to justify. The only principle of order immanent in the labor system is that of employer authoritarianism. Employee labor speech is frail and vulnerable in comparison with commercial speech. The profit incentive relied upon by the Court to justify lowered protection for commercial speech is lacking in the labor context since there is no immediate relationship between picketing or other expressive activities and individual profits.[276] Moreover, unions—viewed in relation to their opposition, business enterprises—cannot be relied upon to secure adequate protection for labor speech through the political process. Unions are heavily outspent by corporations.[277] Although union members do outnumber business owners and stockholders, unions have failed to deliver politically.[278] Finally, the base of union strength in industry has eroded; from a peak of thirty-five percent of the workforce in 1954, union membership sank to less than thirty percent by 1965, and barely twenty percent in 1980.[279] These losses have been attributed to a variety of factors, including the decline of basic industry, changing demographic patterns, and biases in the legal apparatus of collective bargaining—none of which is likely to disappear in the near future. In short, labor expression is not nearly so robust as commercial speech and thus deserves more, not less protection.

Notwithstanding the widely acknowledged decline of unionism, the notion persists that labor speech is adequately protected in the pri-

275. The judgment that business enterprises enjoy at least their fair share of clout in the political process accords with the views of mainstream political theorists. *See, e.g.*, R. DAHL, DEMOCRACY IN THE UNITED STATES 450-93 (1976) (wealthy interests exercise disproportionate influence on political process); C. LINDBLOM, *supra* note 259, at 170-200 (business exercises a disproportionate impact on American politics).

276. *See* M. OLSON, THE LOGIC OF COLLECTIVE ACTION (1965) (arguing that an individual has no incentive to engage in collective activity when her marginal contribution is not likely to influence the result). Furthermore, the threat of legal retribution is a greater deterrent to unions than to business enterprises. Unions cannot afford extensive legal fees, and a single damage award can financially cripple a union for years.

277. Wright, *supra* note 2, at 614 n.35.

278. The political impotence of labor relative to business is illustrated by the failure of labor to secure passage of any legislation affecting the basic structure of private sector bargaining since 1935, despite a determined effort in the late 1970's when the Democratic Party controlled both the Presidency and the Congress.

279. G. BAIN & R. PRICE, PROFILES OF UNION GROWTH 163-65 (1980).

vate sector by the labor laws and in the public sector by the strategic position of public employees. Constitutional scholars have suggested that the protection of private sector labor picketing has been shifted to the federal labor laws.[280]

However, the labor laws as applied provide no substitute for judicial enforcement of the Constitution. Under the labor laws, constitutional values are reversed. Economic activities are valued and protected; political activities are not.[281] Once again, the relegation of labor speech to a "black hole" is apparent. In constitutional analysis, the Court stands aside, entrusting the protection of labor expression to Congress and the NLRB. But under the labor law, expression that is—from a constitutional perspective—of the greatest value goes relatively unprotected. Moreover, the NLRB, which enforces the labor laws, is no substitute for the courts because it is highly susceptible to political influence by succeeding administrations.[282] Nor does the bottom line give reason for confidence; the most precipitous union decline has occurred in the private sector under the aegis of these laws.[283] Finally, given the political weakness of unions, there is no particular reason to believe that Congress will provide adequate safeguards for labor speech.

Protection for public sector labor expression raises the spectre of unions exercising a disproportionate influence on the political process. Collective bargaining is seen by some as a special channel of influence for government employees.[284] The desirability of collective bargaining in public employment is hotly debated and will not be resolved here.[285]

280. *See, e.g.*, G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1417 (10th ed. 1980) (contending that the declining significance of the First Amendment in the labor picketing area is due not only to First Amendment cases withdrawing protection, but also to "congressional occupation of the field and the growing displacement of state control of picketing because of [federal] preemption principles").

281. *See supra* note 48 and accompanying text.

282. *See* Cooke & Gautschi, *Political Bias in NLRB Unfair Labor Practice Decisions*, 35 INDUS. & LAB. REL. REV. 539 (1982) (statistical regression analysis demonstrates the political bias of the NLRB under different administrations).

283. While public sector unions have made major gains since 1955, the percentage of union members in the private sector declined from over 38% in 1954 to 24% in 1978. Weiler, *Promises to Keep: Securing Worker's Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1771-72 n.4 (1983).

284. Wellington & Winter, *The Limits on Collective Bargaining in Public Employment* in PUBLIC EMPLOYEE UNIONS: A STUDY OF THE CRISIS IN PUBLIC SECTOR LABOR RELATIONS 51, 72 (Institute for Contemporary Studies 1976).

285. *Compare id. with* Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156, 1200 (1974) (collective bargaining should be implemented in the public sector because it "provides a structure and procedure which generally reflects the political forces involved").

But—however great the potential problems of collective bargaining may be—they cannot justify the removal of protection from labor speech without searching scrutiny of both the government's interests and the means used to further those interests. The fixing of terms and conditions of employment for public employees is an integral aspect of the political process.[286] Communication among public employees on the job is perhaps their most basic form of participation in that process. In the group-sensitive *Carolene Products* model, there is no justification for removing protection from those expressive activities, particularly where, as in *Connick*,[287] the activities involved are prerequisites to interest group formation. If expressive activities do pose a danger of skewing the political process in favor of public employees, that factor should be considered as one of the state's interests in prohibiting the expression, not as a justification for lowered scrutiny.

Up to now, this Article has argued merely that labor expression should receive at least as much protection as commercial expression, and that if corporations enjoy the right to employ their characteristic forms of economic power in the political process, so should unions. The reasons for affording protection to unions, however, extend beyond bootstrapping on the gains of corporations. The decline of unions means trouble for the pluralist model. Since the 1950's, there has been widespread complacency over the position of labor in our society. In the prevailing view, the Wagner Act, upheld by the Supreme Court in *NLRB v. Jones & Laughlin Steel Corp.*,[288] reversed a century of judicial anti-unionism and incorporated labor into the pluralist polity as a recognized interest group.[289] But if unions continue to lose ground, workers—and in the view of some analysts, all lower income persons—will be left without effective representation in the political process.[290]

286. Wellington & Winter, *supra* note 284, at 72; Summers, *supra* note 285, at 1198. *Cf.* City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976).

287. *Connick*, 103 S. Ct. 1684 (1983) (discussed *supra* text accompanying notes 120-29).

288. 301 U.S. 1 (1937).

289. For a classic statement of this view, see J. GALBRAITH, AMERICAN CAPITALISM 115-57 (1952).

290. *See* Bok, *Reflections on the Distinctive Character of American Labor Law*, 84 HARV. L. REV. 1394, 1416 (1971) ("[T]he depressed voting rates of manual workers, and the low level of unionization in the labor force, create large segments of working people who lack much political strength in government circles. The upshot is not that nonunion workers lack any political representation; unions do press for social welfare measures that primarily benefit poor workers, and politicians of both parties have advocated similar measures. Nevertheless, it is probably fair to say that workers in unorganized sectors of our economy have much less political influence than their counterparts in similar occupations abroad."). *See also id.* at 1424 (unions have remained the only major organized group to press for improvements in

Moreover, the void of constitutional protection is particularly harmful to the large and rapidly growing number of workers employed in service, clerical, and agricultural jobs, which are mostly nonunionized. These workers are in desperate need of interest group representation, but the Court has spotted no *Carolene Products* problem in restrictions upon their self-organization as employees.[291]

The Court is not likely to show much concern over this situation so long as it views unions as coercive, selfish wards of the state that derive their legitimacy solely from the narrow economic function they perform in the system of collective bargaining.[292] The merits of that view, which derive not from any legal source but from Selig Perlman's famous treatise on American labor unions,[293] cannot be addressed adequately in this Article. It is important, however, to make three brief points. First, as long as the current structure of collective bargaining remains in place, there will be a tension between unions as voluntary associations of workers, and unions as government-shaped organizations with a legally defined role to play in collective bargaining. Though suppression of the voluntary association aspect may be integral to the national labor policy,[294] it is highly suspect when viewed through the lens of the *Carolene Products* vision, since it represents a selective constraint on interest group organization. Moreover, the fact that unions are to some extent narrow economic organizations is as much a result of the withdrawal of constitutional protection as a justification

social welfare legislation). Mainstream political theorists have long recognized that the level of participation and influence of lower income people in the United States is strikingly low compared to other western-style democracies. *See, e.g.*, R. DAHL, *supra* note 275, at 451. Even the current effectiveness of unions as representatives is open to question. *See supra* notes 278-80 and accompanying text.

291. *See* Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 312-14 (1979) (upholding Arizona law that excluded most of the UFW's membership from representation elections).

292. This picture emerges clearly from the cases discussed in this Article. Labor picketing is deemed inherently coercive, regardless of the particular facts. *See supra* text accompanying notes 190-92. Selfish and petty labor concerns are contrasted with noble public expression. *See supra* text accompanying notes 115, 124, 228-33. The view that unions are confined to a narrow function involving "private" economic concerns is discussed in Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978); Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981). The notion that state involvement is responsible for union power has been invoked to justify constraints on union but not corporate power. *See supra* notes 10-11 and accompanying text.

293. *See generally* S. PERLMAN, A THEORY OF THE LABOR MOVEMENT (1928).

294. *See* Klare, *Critical Theory and Labor Relations Law*, in THE POLITICS OF LAW 65, 78-80 (D. Kairys ed. 1982).

for that withdrawal.[295] The remedy should be more protection for democratic and progressive trends within the labor movement, not continued privatization and suppression. The Constitution does not enact Selig Perlman's vision of American trade unionism.

Second, the labor movement is much too variegated for a single picture to describe the reality.[296] There is no basis—other than overt antipathy toward labor—for the blanket removal of protection from labor expression without regard to the actual coercive character of union protests or the "selfishness" of their goals. Yet, the Court has withdrawn protection from both noncoercive and coercive picketing,[297] and from both young idealistic unions as well as older business unions.[298] At a minimum, the Court should—in the labor context as well as the civil rights context—avoid burning down the forest to kill a few "reptiles hidden in the weeds."[299]

Finally, neither selfishness nor state sponsorship can serve as a basis for elevating corporate speech above union speech in the hierarchy of First Amendment values.[300] Although there may be worries that unions will become "little commonwealths" within the big one, these worries do not distinguish unions from corporations. During the late 1940's and early 1950's, when excavation of the black hole began, many

295. The idealistic trends in the labor movement were dealt a massive blow in the late 1940's in the name of fighting communism. The Supreme Court, as part of its general capitulation to McCarthyism, upheld the anticommunist affidavit requirement used to carry out this purge. *See* American Communications Ass'n v. Douds, 339 U.S. 382 (1950). Years later, the Court overturned similar requirements applied to the NAACP. Louisiana v. NAACP, 366 U.S. 293 (1961). Similarly, the system of exclusive bargaining representation fostered trends toward bureaucratic rule. In response, Congress passed legislation designed to protect internal union democracy. *See, e.g.*, 29 U.S.C. §§ 401-531 (1975). But the Court construed this legislation narrowly in the interest of preserving the unions as effective agents of industrial stability. *See, e.g.*, Calhoon v. Harvey, 379 U.S. 134 (1964) (holding that the Secretary of Labor had exclusive discretion to enforce membership rights to nominate candidates and vote in union elections). *See generally* James, *Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections*, 13 HARV. C.R.-C.L. L. REV. 247 (1978).

296. *See* Pope, *Free Speech Rights of Union Officials Under the Labor Management Reporting and Disclosure Act*, 18 HARV. C.R.-C.L. L. REV. 525, 530-38 (1983) (demonstrating that four distinct visions of unionism—some narrow and economic, others not—compete within the union movement).

297. *See supra* text accompanying notes 189-92.

298. Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979) (discussed *supra* note 291).

299. *Claiborne*, 458 U.S. at 933-34.

300. *See, e.g., Central Hudson*, 447 U.S. at 566-67 (status as a state monopoly does not deprive a corporation of its right to engage in commercial expression); *Consolidated Edison*, 447 U.S. at 533-34 (status as a state monopoly does not deprive a corporation of its right to engage in political expression). *See generally* Brudney, *supra* note 2.

observers feared that the labor movement was on the verge of becoming a dominant faction. Under current conditions, however, those fears can only be described as paranoid.[301]

C. Beyond *Carolene Products*: On the Slippery Slope Toward Rights of Economic Participation

The Supreme Court has decisively rejected attempts to insulate the political process from influence by concentrated economic power,[302] or to prohibit the use of the political process for private economic purposes.[303] In so doing, the Court has breached the liberal *cordon sanitaire* between the economic and political systems, albeit on a selective basis.[304] This move toward a dialectical (or interconnected) view of political and economic life could, if consolidated, mark the beginning of a third stage in the historical development of the economic-political distinction in constitutional law.

The first stage was that of classical liberalism. Common law doctrines of conspiracy and tortious interference outlawed most forms of labor or consumer organization, while constitutional rights of property and contract insulated the market from political intervention.[305] The second stage was that of pluralist liberalism. Government was permitted to intervene massively in the market with the aim of setting up "fair competition" both among business enterprises and between labor and capital. This was accomplished not by creating constitutional rights of economic participation, but by removing property and contract barriers to legislative intervention. The market became a kind of no-man's land in constitutional law. The *Carolene Products* footnote provided a theo-

301. *See supra* text accompanying notes 277-79. Even John Kenneth Galbraith, who is credited with originating the influential idea that unions provide a countervailing weight to corporate power, has since acknowledged that he took an "unduly sanguine view of the resulting equilibrium." *See* J. GALBRAITH, *supra* note 73, at 74 n.1.

302. *See* Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) (right to associate for purposes of raising and spending money); *Bellotti*, 435 U.S. 765 (1978) (right of organizations chartered for economic purposes to enter into the political process); Buckley v. Valeo, 424 U.S. 1 (1976) (right to spend money on political campaigns); *see also Claiborne*, 458 U.S. 886 (1982) (right to withhold patronage); Missouri v. NOW, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980) (right to engage in boycott activities to encourage ratification of constitutional amendment).

303. *See* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972) (access to courts) (dictum); United Mine Workers v. Pennington, 381 U.S. 657 (1965) (lobbying); *Noerr*, 365 U.S. 127 (1961) (appeals to electorate).

304. In most major theories of liberalism, a sharp distinction has been drawn between the economic and political systems. For a classic argument that the political system should be insulated from economic power, see J. RAWLS, *supra* note 246, at 225-28.

305. *See generally* AFL v. American Sash Co., 335 U.S. 538, 542-43 (1949) (Frankfurter, J., concurring).

retical foundation for the economic-political distinction in this new form.[306]

This Article optimistically refers to the nascent third stage as "dialectical pluralism" because it recognizes to a limited extent the interconnected character of economic and political struggle. It is, perhaps, less of a coherent stage than a slippery slope between *Carolene Products* and constitutional protection for general rights of economic participation.[307]

Having recognized the right of selected groups to employ certain forms of economic power in the political process, the Court is now under pressure to extend those rights to other groups and forms of economic power.[308] From there, it would be but a small step to recognize that the processes which produce economic power are integrally, though indirectly, related to the political process itself. This step would reflect a recognition that interest groups are engaged in a combined political-economic struggle for power, and that the First Amendment guarantee of free speech should apply to both aspects of this struggle. To put it another way, if the Constitution envisions political processes founded on free debate among contending viewpoints and if it also protects the free exercise of economic power in those processes, then it follows that the processes which produce this economic power should also be governed by the principle of free debate among opposing viewpoints. This hypothesis, though not expressly articulated by the Court, may underlie protection for commercial speech.[309] Although an ex-

306. *See generally* McCloskey, *supra* note 242.

307. The question of the exact type of economic rights that should be recognized is a subject of intense debate. In the view of some, the Court should revive the *Lochner* era protection of individual rights to engage in free-enterprise activites. *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW 549-50 (2d ed. 1977). Others argue that the Court should protect collective rights to influence economic decisionmaking. *See generally* M. WALZER, *supra* note 259.

308. In saying that the Supreme Court is under pressure, this Article does not suggest that the Court is mechanically constrained by norms of fairness and rationality. As the *Lochner* era illustrates, the Court can hold out for long periods of time utilizing a patently partisan approach. However, as long as the Court attempts to shield itself from criticism and pressure by erecting neutral-sounding doctrinal rationalizations, the selective granting of rights to exercise economic power is likely to be a sore spot. The Court could, of course, resolve the tension by returning to the pre-*Buckley* situation when those rights were not recognized. A return to the narrow, formal view of the political process would, however, merely preserve the illusion that the economic and political systems can be surgically separated.

309. *Compare, e.g., Central Hudson*, 447 U.S. 557 (1980) (protecting commercial expression by public utility) *with Consolidated Edison Co.*, 447 U.S. 530 (1980) (protecting political expression by public utility). In both cases, utilities were fighting for their continued existence against state policies that favored their economic competitors. The fact that one utility

tended discussion on rights of economic participation is beyond the reach of this Article, it should be noted that pluralist liberal methodology can generate both functional[310] and philosophical[311] arguments in favor of an integrated conception of political and economic power.

In repudiating the liberal effort to keep economic power out of the political process, the Court has damaged the ideology that supports that process. Historically, the idea of "one person-one vote" has served as a powerful legitimator.[312] Although the correspondence of the idea with social reality—in terms of actual political influence—has long been challenged, the idea itself retains considerable force. In major part, its continuing vitality derives from the simple fact that on election day each citizen can enter a polling place and cast one and only one ballot.

In contrast to voting, the various forms of economic power lack *any* common denominator that is possessed by individuals in equal shares. Economic power rests upon the shifting and diverse base of the capitalist economy. An individual's share of economic power depends upon his assets, capabilities, and strategic position in the economy. Hence, the Court's forthright sanctioning of the use of economic power in the political process necessarily conflicts with the ideal of equal political influence among individuals.

In response to this problem, many critics simply cling to the liberal view that the political and economic systems should be kept sepa-

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was pursuing this struggle in the political process and the other in the economic marketplace may have been less important than the fact that both were using speech in a struggle for power and survival.

310. The *Carolene Products* vision, standing alone, guarantees groups the right to organize and participate in the formal processes of democracy. But these rights do not guarantee a fair process when, under the guise of economic regulation or taxation, the state can prevent an interest group organization from fulfilling its function. Thus, Judge J. Skelly Wright has suggested that the right to strike should be constitutionally protected because freedom of association requires protection of "essential organizational activities which give the association life and promote its fundamental purposes." United Fed'n of Postal Clerks v. Blount, 325 F. Supp 879, 885 (D.C. Cir.) (three-judge district court) (Wright, J., concurring), *aff'd*, 404 U.S. 802 (1971).

311. The method of the original position as developed by John Rawls could, though Rawls himself avoids the subject, generate a plausible argument for recognition of rights of participation in the workplace. According to Rawls, rational individuals, placed in the position of having to decide on a social system without knowing what position they would occupy in that system, would value complete equality of political liberty over any material benefit. J. RAWLS, *supra* note 246, at 60-65. It seems reasonable to conclude that those same liberty-loving individuals, recognizing that they would most likely spend the bulk of their waking time in a subordinate position in an economic institution, would also value liberty there.

312. *See* J. GALBRAITH, *supra* note 73, at 147.

rate.[313] This approach, however, has two crippling diasdvantages. First, it is bad strategy. The Court has committed itself to some merging of the political and economic systems. To stand back and attack the merger itself is to evade the debate over the central issue now confronting the Court: how to structure and limit constitutional protection for rights of economic participation.

Second, and more fundamentally, this approach ignores the reality that in our society political and economic power are intimately and inseparably intertwined. A pristine "one person, one vote" political system cannot coexist alongside the current economic system—which is characterized by immense disparities of wealth and power—without considerable seepage of economic power into the political system.[314] The question is how to limit and direct the political exercise of economic power.

A different approach is presented in Michael Harper's recent article on boycott rights.[315] Harper suggests that the boycott rights recognized in *Claiborne*[316] should be extended to labor disputes, but only for consumer boycotts; thus, *Safeco*[317] but not *ILA*[318] should be overruled. He argues that consumer boycotts closely resemble voting because consumer power is diffuse. By contrast, "individuals as producers and owners of capital have specialized and very unequal market power. By threatening to withhold their services or capital, some indivduals can exert disproportionate leverage over important social decisions."[319] Hence, in this view producer boycotts should remain outside the zone of constitutional protection.

Harper's approach, if applied to the general problem of economic and political power, would protect those forms of economic power that resemble voting power in that they are spread among a large number of individuals. It would seek to expand rights of economic participation

313. *See supra* note 304 and accompanying text.

314. Political theorists have long argued that the prevention of corruption in the political system requires rough equality in the economic system. *See* Parker, *The Past of Constitutional Theory—and Its Future, supra* note 65, at 256. The impossibility of separating the political and economic systems has prompted one commentator to suggest that the best way to insure equality under the First Amendment is to work for the overall equalization of wealth. *See* Powe, *Mass Speech and the Newer First Amendment,* 1982 SUP. CT. REV. 243, 282-83.

315. Harper, *The Consumer's Emerging Right to Boycott:* NAACP v. Claiborne Hardware *and Its Implications for American Labor Law,* 93 YALE L.J. 409 (1984).

316. 458 U.S. 886 (discussed *supra* text accompanying notes 209-15).

317. 447 U.S. 607 (1980) (discussed *supra* text accompanying notes 185-96).

318. 460 U.S. 212 (1982) (discussed *supra* text accompanying notes 219-26).

319. Harper, *supra* note 315, at 426-27. In this view, there is no conflict between *Claiborne* and *ILA.*

while retaining controls on concentrated economic power. This approach has much to recommend it. As Harper points out, the direct exercise of dispersed economic power can be an effective form of democratic participation.[320] And, on the other hand, the political use of concentrated economic power poses serious dangers to democracy.

Unfortunately, continued nonprotection of employee producer boycotts would preserve a gross imbalance in the access of capital and labor to that potent form of power. In Harper's view, nonprotection of employees' rights to use producer power is balanced by similar nonprotection of business rights to employ such power. Yet, formally equivalent nonprotection only obscures the systematic bias that results from denying protection to employee boycotts.

At present, business enterprises are free to use their power as producers to influence governmental action.[321] Indeed, nothing is more common than threats by businesses to move their productive capital out of a state or locality unless the "business climate"—that is, the regulatory and tax system—is improved. Even within the labor context, there are few restrictions on the withholding of productive capital. An employer is free to close its entire business for any reason.[322] Partial closings are not prohibited unless motivated by anti-union animus.[323] Only "lockouts," temporary closings in connection with labor disputes, are effectively restricted. Given the increasing mobility of capital, however, even this restraint is quickly losing its significance. Employers can accomplish similar results by closing or partially closing facilities in one area and transferring productive capacity to another. The workers in the new locality will not be the same individuals who have received the lesson of the closing, but—given the frequency of shutdowns—employers can select a new locality where the workers already have been subjected to similar closings by other employers.[324]

In short, formally equivalent nonprotection permits the state to shackle employees' use of producer power while allowing the untrammelled exercise of corporate producer power. In the functional view, this imbalance would not create a constitutional problem if the regulation of producer power could safely be left to the political process.

320. *Id.* at 422-23.

321. *See, e.g.,* Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 645-60, 304 N.W.2d 455, 464-71 (1981) (Ryan, J., dissenting) (General Motors pressured the City of Detroit into condemning a neighborhood to provide space for an assembly complex).

322. *See* Textile Workers Union v. Darlington Co., 380 U.S. 263, 269-74 (1965).

323. *Id.* at 274-75.

324. *See generally* B. BLUESTONE & B. HARRISON, THE DEINDUSTRIALIZATION OF AMERICA (1982).

Harper's own rationale for nonprotection, however, belies that possibility. He argues that producer power may be restricted not because it is politically insignificant or harmless, but because it is a dangerous and potent form of power—indeed, far more potent than the relatively diffuse consumer power. Selective constraints on the use of a politically potent form of power pose obvious constitutional problems for the functional theories of the First Amendment, which rely upon a fair process to legitimate legislative outcomes. Hence, the contradiction between the labor black hole and the functional vision of the First Amendment cannot be resolved short of constitutional protection for employee producer boycotts, as well as more dispersed forms of economic power.

Conclusion

> In the end, . . . in the long distant end—and always assuming that things will continue to move in the direction in which they now seem to be moving, we might decide that the universe will consist of black holes only—and finally, perhaps, into one black hole containing everything. The entire universe will have collapsed.[325]

The three-systems ladder has an air of value neutrality about it. Within each system, speakers and viewpoints are treated equally.[326] But the boundaries of the systems are set to ensure that the expressive activities most vital to corporate power—the purchase of political voice and the commercial advertisement of products—receive heightened protection. The principal exception to this generalization is the Court's continued solicitude for civil rights protests without regard to which of the three systems is involved.

As this Article demonstrates, the Court has selectively breached the liberal *cordon sanitaire* between the political and economic systems. The best prospect for rectifying the resulting inequality lies not in the contraction of protection for corporate expression, but in the expansion of protection to cover the expressive activities of workers and labor organizations, the main counterweights to corporate power.

Over forty years ago, the Supreme Court recognized that "[f]ree discussion concerning the conditions in industry and the causes of labor disputes [is] indispensable to the effective and intelligent use of the processes of popular govenment to shape the destiny of modern indus-

325. I. ASIMOV, THE COLLAPSING UNIVERSE 152 (1977).

326. Expression in the government employee context represents an exception to this neutrality.

trial society."[327] In light of structural changes in the organization of capital over the past several decades, that observation is doubly true today. The increasing mobility of capital is breaking down the legally-imposed privatization of labor-management relations. Professors Barry Bluestone and Bennett Harrison have argued convincingly that industrial plant closings and reopenings are tearing apart the fabric of society.[328] The resulting conflicts are shifting from the collective bargaining process to the political process. Corporations are openly using the threat of disinvestment to pressure local government into political concessions.[329] Unions are uniting with church groups and community associations to preserve their communities.[330] Furthermore, the increasing dependence of private industry on government contracts is blurring the distinction between political and economic labor activity.[331] In short, the contention that labor expression does not embrace "matters of public concern" no longer stands the test of reality.

Admittedly, the Supreme Court is not likely to dispense with the three-systems ladder in the near future. However, state courts and lower federal courts may be receptive to the argument that the expansion of protection for the expressive activities of corporations and civil rights protestors has undermined the justifications for denying similar protection to workers and unions.[332] State courts possess the power to provide protection for labor expression outside the zone of federal preemption— most notably in cases involving the expressive activities of state and local government workers. And, federal district courts enjoy a wide range of discretion in handling labor expression, particularly in the critical area of labor injunctions.[333] For the forseeable future, the most effective legal criticism of the labor black hole may be advanced in those forums.

327. Thornhill v. Alabama, 310 U.S. 88, 103 (1940).

328. *See* B. BLUESTONE & B. HARRISON, *supra* note 324.

329. *See supra* note 321.

330. *See* B. BLUESTONE & B. HARRISON, *supra* note 324, at 238-39. In one instance, a combined union-church-community picket line convinced the mayor of a small city to order a plant shut down in protest against a productivity push by management. *Id.* at 169-70.

331. Indeed, one commentator has suggested that collective bargaining is gradually being displaced by political activity aimed at executive contracting officials and the legislative branch of government. *See* Hyde, *Beyond Collective Bargaining: The Politicization of Labor Relations Under Government Contract*, 1982 WIS. L. REV. 1, 41.

332. The California Supreme Court recently hinted that it might be receptive to this approach. *See* Environmental Planning & Information Council v. Superior Court, 36 Cal. 3d 188, 198 n.9 (1984).

333. *See, e.g.*, Consolidation Coal Co. v. Disabled Miners, 442 F.2d 1261, 1264 (4th Cir.), *cert. denied*, 404 U.S. 911 (1971).